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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HARRIS COUNTY FLOOD CONTROL DISTRICT, ET AL.,
Petitioners

v.

CARL JOHNSTON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the prohibition against retaliation in Title VII supersede the goal of eliminating discrimination in the workplace so that an employer must allow a racially discriminatory supervisor to stay in his position and continue his racially discriminatory practices to avoid liability under Title VII for allegations of retaliation?

2. Can an allegation of retaliation for testimony at an Equal Employment Opportunity hearing give rise to a First Amendment action under 42 U.S.C. § 1983 in addition to an action under Title VII?

3. Does a public employee acquire the protection of the First Amendment for speech which pertains wholly to matters unrelated to public concern by merely testifying at an internal grievance hearing concerning such matters?

PARTIES TO THIS PROCEEDING

Plaintiff:

Carl Johnston

Defendants:

James B. Green
Wayne Phipps
Monroe E. Jordan
Harris County, Texas
Harris County Flood Control District
Harris County Commissioners Court

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CARL JOHNSTON,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, the Harris County Flood Control District, Harris County, Texas, the Commissioners Court of Harris County, Texas, James B. Green, Wayne Phipps and Monroe E. Jordan respectfully request that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the opinion of that Court which was entered on April 17, 1989 in *Johnston v. Harris County Flood Control District, et al.*

REFERENCE TO THE OPINIONS DELIVERED BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 869 F.2d 1565 and is reprinted as Appendix A hereto.

The District Court's Findings of Fact and Conclusions of Law were not reported but are printed as Appendix D and G hereto.

STATEMENT OF GROUNDS INVOKING JURISDICTION

(i) The opinion of the Court of Appeals was entered on April 17, 1989.

(ii) Appellee's petition for rehearing was denied May 22, 1989.

(iii) Petitioners were granted an extension of time up to and including September 19, 1989 within which to file this Petition for Writ of Certiorari.

(iv) The jurisdiction of this Court to review the judgment of the Fifth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional amendments and federal statutes are as follows:

UNITED STATES CONSTITUTION

AMENDMENT I—Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000e-2

Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3

Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees

or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Petitioner Harris County Flood Control District (H.C.F.C.D.) is a unit of local government created by Article 8280-120, Vernon's Annotated Texas Statutes, to develop and maintain drainage within Harris County, Texas. Petitioners Green, Jordan and Phipps were at all times relevant to this case supervisors within H.C.F.C.D. Respondent Johnston began his employment with H.C.F.C.D. in 1950 and held the position of supervisor of equipment maintenance at the H.C.F.C.D. from 1977 until 1981 when he was terminated under circumstances which are disputed in this action.

At trial petitioners introduced evidence which showed that respondent had exhibited significant management deficiencies as a supervisor including racial prejudice, favoritism, an inability to manage purchasing of parts and equipment, and unacceptable downtime of equipment. Petitioners also presented evidence that attempts to alleviate these problems had been unsuccessful and that dissatisfaction with these practices formed the basis of removing respondent from his supervisory position. Respondent was reassigned to positions which eliminated his

control over employees he had formerly supervised. Even though his responsibilities were reduced he was allowed to maintain his title and salary pending what petitioners believed to be respondent's imminent retirement. (During this time he did not receive any raises although most H.C.F.C.D. employees did.)

Ultimately, in May, 1981, respondent suffered a serious on the job injury which curtailed his ability for physical activity. Upon returning to work respondent presented a letter from his doctor indicating certain physical limitations. Petitioners created a new position at a lower salary to accommodate the physical limitations of respondent, a position which he refused to accept. Respondent was then terminated from employment.

Respondent contended that his termination was in retaliation for his testimony at an EEO hearing. On July 24, 1980, the Commissioners' Court (the governing body of the H.C.F.C.D.) held a closed session to hear an Equal Employment Opportunity complaint raised by Marilon Speed. The transcript of this hearing is included in Appendix I. (See page 79a) Ms. Speed testified that she had substantial friction with her co-workers which she felt led to an unfair Union instigated firing. Included in her testimony is a description of an incident in which some employees instigated a work stoppage in protest of her behavior and it was necessary for both respondent Johnston and petitioner Jordan to come to her job site to address this unrest. Respondent Carl Johnston, who was Ms. Speed's supervisor, testified that Ms. Speed had been following his directions and, therefore, should not have been fired. (p. 101a).

The District Court entered judgment against petitioners under both Title VII and 42 U.S.C. § 1983 based on

its holding that testimony at the aforementioned EEO hearing was the basis for the termination of respondent. The District Court, however, recognized the racial prejudices of respondent, and the unsuccessful efforts of petitioners to correct these prejudices, in the following finding of fact:

> "Plaintiff, however, did have a long history of strained relations with minority employees and of favoritism toward certain employees, including Ms. Speed. In contrast, Defendants, Green, Jordan, and Phipps had worked to improve employee relations at H.C.F.C.D. Indeed, these Defendants exerted substantial efforts to cure employee dissatisfaction caused by Plaintiff's attitudes toward minority employees and favoritism toward certain employees."

(p. 46a)

On appeal petitioners contended that the above captioned fact finding indicated discriminatory practices by respondent inimical to Title VII and which would subject H.C.F.C.D. to vicarious liabiiity under Title VII, if petitioners had allowed respondent to continue in his position.[1]

The Fifth Circuit rejected this argument holding contrary to the finding of the trial court set out above, that petitioners had made "feeble efforts" to eliminate discrimination in the workplace and that petitioners had tolerated respondent's racial biases. The Fifth Circuit concluded that it was not relevant that petitioners might be liable to employees who were victims of respondent's

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1. Petitioners also challenged the finding of retaliation in view of the uncontroverted evidence at trial that respondent had the worst record in purchasing management and was the most frequent object of union relayed complaints. Petitioners would reserve right to address these issues, if necessary, in the brief on merits as rebuttal to any argument regarding the evidentiary viability of the District Court's findings.

continuing discriminatory practices since no claims of discrimination had been filed.

The testimony given by respondent at the July 24, 1980 hearing touched no matters which could be defined as public concern but merely dealt within an internal personnel dispute of a personal nature. The District Court held, however, that testimony before a government fact finding body was sufficient to constitute a context which would be protected speech. This view was adopted by the Fifth Circuit.

The Fifth Circuit affirmed the findings of liability under Title VII and 42 U.S.C. § 1983 by the District Court but reversed and remanded for a redetermination of damages after finding that respondent had failed to mitigate. A motion for rehearing regarding the damage issue was filed by respondent and overruled.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT IS CONTRARY TO THE PURPOSES OF TITLE VII SINCE PETITIONERS ARE BEING HELD LIABLE UNDER TITLE VII FOR TAKING AN ACTION WHICH PETIONERS WERE REQUIRED TO TAKE TO AVOID LIABILITY UNDER TITLE VII, TO WIT: REMOVING A DISCRIMINATORY SUPERVISOR FROM THE WORKPLACE.

In the recent case of *Price Waterhouse v. Hopkins,* ____U.S.____, 109 S. Ct. 1775, 1786 (1989), the purposes of Title VII were discussed by this Court as follows:

> "[O]ur emphasis on 'business necessity' in disparate-impact cases, see *Watson* and *Griggs*, and on 'legitimate, nondiscriminatory reason[s]' in disparate-treatment cases, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed. 2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981), results from our awareness of Title VII's balance between employee rights and employer prerogatives. In *McDonnell Douglas*, we described as follows Title VII's goal to eradicate discrimination while preserving workplace efficiency: 'The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. *In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise*'. 411 U.S., at 801, 93 S. Ct., at 1823-1824." (emphasis added.)

The decision of the Fifth Circuit in this case constitutes a serious impediment to the purpose of elimination of employment discrimination contemplated by Title VII. For Title VII to be effectively implemented by employers, employers must be able to take the necessary steps to assure a discrimination free workplace. The following finding of the District Court in this cause indicates that petitioners had embarked on such a course:

> "Plaintiff, however, did have a long history of strained relations with minority employees and of favoritism toward certain employees, including Ms. Speed. In contrast, Defendants Green, Jordan and Phipps had worked to improve employee relations at HCFCD. Indeed, these Defendants exerted substantial efforts to cure employee dissatisfaction caused by Plaintiff's attitudes and policies, specifi-

> cally Plaintiff's attitudes toward minority employees and favoritism toward certain employees."

(Finding of Fact No. 12, p. 46a)

It is clear from this finding that Petitioners had an overall policy of combating discrimination, that petitioners' efforts to modify respondent's discriminatory practices were part of this general practice, that such efforts were not used to single out respondent, and that the respondent had nevertheless continued his discriminatory practices. As this finding clearly indicates, given the failure of respondent to cease his discriminatory practices, and the dictates of Title VII which require the elimination of discrimination, it was incumbent upon petitioners to remove respondent from his supervisory position where he could continue to practice discrimination. Failure to take such an action would have subjected petitioners to liability for the discrimination of respondent.[2]

The holding of the Fifth Circuit that petitioners are liable under Title VII for removing a discriminatory supervisor raises the following issues:

1. What are the rights of the minority employees who continue to be subjected to the discriminatory practices of appellee?
2. How long can appellee continue his discriminatory practices under a protective umbrella of Title VII?
3. Are appellants liable to the minority employees for the discriminatory practices of appellee during any period that appellants are forced to continue to allow appellee to act as a supervisor in order to avoid Title VII liability?

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2. In its opinion in this case, the Fifth Circuit states "As H.C.F.C.D. correctly explains, an employer is liable for the discriminatory acts of its supervisory personnel." p. 14a.

The Fifth Circuit dismissed the questions regarding the rights of minority employees by stating that no such claim was before it. By this rationale it was permissible for respondent to remain in his position despite his racial intolerance until a minority employee was sufficiently aggrieved to file a charge of discrimination. Such a result —requiring an employer to wait until an employee contends it is liable for discrimination—is wholly inconsistent with the purpose of Title VII. The net effect of this holding is to create a period of permissible discrimination.

The very nature of Title VII cases is to achieve a "delicate balance between employee and employer rights." *Patterson, supra* at 2375, n.4. In the case at bar a recalcitrant supervisor, unresponsive to the efforts of his employer to reform his discriminatory practices, seeks the protection of Title VII for his testimony at a hearing entitled an "Equal Employment Opportunity" hearing, but which in effect addressed no issues of Title VII discrimination. The statements by the Fifth Circuit that Petitioners made "belated and feeble efforts to eliminate discrimination" are inapposite to the findings of the District Court, as are the statements that petitioners tolerated the racial attitudes and practices of respondent. p. 14a. Even assuming arguendo that respondent was an ardent foe of sex discrimination (a fact that has been not set out in this record), one who practices racial discrimination must ultimately bear the consequences therefore irrespective of any opposition to other forms of discrimination. It is inherently inimical to the purposes of Title VII to allow one who unrelentingly practices racial discrimination to seek the protection of Title VII to maintain his position where he can continue to discriminate. Indeed, as an action in equity, Title VII can not tolerate such unclean hands.

The decision of the Fifth Circuit places a chilling effect on an employer's ability to implement the policies of Title VII. For Title VII to be effective, employers must be able to take corrective measures regarding discriminatory supervisors who fail to modify their actions. Accordingly, this Court should grant this writ of certiorari and reverse the judgment of the Fifth Circuit holding petitioners liable under Title VII.

II.

THE DECISION BELOW THAT A PUBLIC EMPLOYEE WHO ALLEGED THAT HE WAS THE VICTIM OF RETALIATION FOR TESTIFYING AT A HEARING COMMENCED TO CONSIDER AN EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT HAS CAUSE OF ACTION UNDER 42 U.S.C. § 1983 FOR FIRST AMENDMENT VIOLATION IN ADDITION TO HIS ACTION UNDER § 704(a) OF TITLE VII IS AN IMPORTANT QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

The issue presented by the case at bar is whether the Fifth Circuit was correct in holding that an employee may circumvent the procedures and limitations of Title VII by contending that testimony which is protected by the terms of Title VII is also the basis for an independent cause of action under 42 U.S.C. § 1983 for violation of the First Amendment. The decision of the Fifth Circuit, if left undisturbed, will have the effect of eviscerating both the remedial scheme of Title VII, and the balance between employer and employee rights struck by Title VII, results which this Court disapproved in *Great American Federal Savings and Loan Association v.*

Novotny, 442 U.S. 366 (1979) and the recent case of *Patterson v. McLean Credit Union*, ____U.S.____, 109 S. Ct. 2363 (1989). In *Novotny* this court held that rights granted under Title VII can not be asserted within the remedial framework of 42 U.S.C. § 1985. In reaching this decision, the court noted that 42 U.S.C. § 1985 creates no substantive rights and that bringing a cause of action under § 1985 for violation of Title VII would undermine the specific remedial structure of Title VII which was created by Congress, especially the intent of Congress for disputes to be resolved through conciliation. Citing *Novotny*, the Fifth Circuit has noted that the same rationale prevents an action for violation of Title VII from being brought by employee under 42 U.S.C. § 1983. *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984).

In *Patterson v. McLean Credit Union, supra*, this Court stated "we should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute". 109 S. Ct. at 2375. Specifically addressing Title VII, the Court recognized the necessity to preserve the effectiveness of Title VII when interpreting § 1981 as follows:

> "Unnecessary overlap between Title VII and § 1981 would also serve to upset the delicate balance between employee and employer rights struck by Title VII in other respects. For instance, a plaintiff in a Title VII action is limited to a recovery of backpay, whereas under § 1981 a plaintiff may be entitled to plenary compensatory damages, as well as punitive damages in an appropriate case. Both the employee and employer will be unlikely to agree to a conciliatory resolution of the dispute under Title VII if the employer can be found liable for much greater amounts under § 1981." 109 S. Ct. at 2375, n.4.

The question of the applicability of 42 U.S.C. § 1983 where Congress has enacted more specific statutory remedies was fully developed in *Middlesex County Sewerage Authority v. National Sea Clammers,* 453 U.S. 1, 101 S. Ct. 2615 (1981). This court held: "when 'a state official is alleged to have violated a federal statute' which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit under § 1983." [Quoting dissent of Justice Stewart in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 673 U.S., 99 S. Ct. 1905, 1945 U.S.] The court further noted in *Middlesex* that even the savings clauses of the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* and Marine, Protection Research and Sanctuaries Act of 1972, 33 U.S.C. § 1401, *et seq.* which specifically preserved common law rights did not authorize an action under § 1983 which would have the effect of using common law to attempt to enforce the standards set forth under these statutes. 453 U.S. 20 n.31.

Middlesex is closely akin to the case at bar in that Title VII has a specific enforcement scheme for claims of retaliation and this preempts the general remedy of 42 U.S.C. § 1983.[3] Respondent bases his First Amend-

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3. As the Fifth Circuit noted, the question of overlapping remedies between Title VII and § 1983 has never been addressed by this Court. The opinion of the Fifth Circuit relies heavily on the conclusions of *Keller v. Prince George's County,* 827 F.2d 952 (4th Cir. 1987). *Keller* and the other cases cited by the Fifth Circuit rest primarily on interpretations of the legislative history of the 1972 Civil Rights Act. In interpreting the intent of Congress in enacting this statute, this Court has referred to the portion of House Report No. 92-238 pertaining to State and Local Government Employees. *Brown v. General Services Administration,* 425 U.S. 820, 833-834 (1976). This section of the House Report discusses only actions

ment claim on his appearance before a closed session of the Commissioners Court of Harris County which was sitting as the governing body of the Harris County Flood Control District. The hearing was convened to consider an equal employment opportunity claim although the testimony given pertained only to personal disputes of an individual employee without reference to disparate treatment based on sex. The testimony did not pertain to a matter of public concern.

In deciding that § 1983 was applicable, the Fifth Circuit placed the emphasis on the fact that testimony was provided before an "official governmental adjudicatory" body. The Court held this was a context which elevated the speech to a matter of public concern and thus subject to an action under § 1983 as well as Title VII. By this analysis virtually all forms of activity protected by § 704(a) of Title VII would be the basis for a § 1983 action since any form of testimony would, under the interpretation of the Fifth Circuit, be by its very "context" protected speech and actionable under § 1983.

The effect of this decision would be to bypass Title VII and its carefully crafted remedial scheme including the procedures for conciliatory resolution of disputes. Furthermore, as this Court noted in *Patterson*, the possibility of a § 1983 action would impede negotiated settlements under Title VII and upset the balance of rights

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under § 1983 to prohibit discrimination, i.e., actions which would be brought under the equal protection clause. (See *Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364 (4th Cir. 1989), interpreting *Keller*.) There is no discussion in the House Report which specifically alludes to any intent to preserve First Amendment actions under the due process clause as a parallel remedy for claims of retaliation under Title VII. See U.S. Code Cong. & Admin. News 1972, P. 2152-2154.

between employer and employee. This court in *Patterson* and *Novotny* favored a preservation of the specific remedies of Title VII rather than the general remedy of 42 U.S.C. § 1983. Accordingly, this Court should grant this writ of certiorari to review this issue and reverse the judgment of the Fifth Circuit holding that respondent had a cause of action under 42 U.S.C. § 1983.

III.

THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH THE DECISION OF THIS COURT IN *CONNICK V. MYERS*, 461 U.S. 138 (1983) WHICH HELD THAT MATTERS OF PUBLIC CONCERN DO NOT CONSTITUTE PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

The decision of the Fifth Circuit in the case at bar contradicts the holding of this Court in *Connick v. Myers*, 461 U.S. 138 (1983), regarding the definition of protected speech by public employees. This Court in *Connick* held the definition of protected speech by public employees is as follows:

> "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. *Board*

of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann, supra; Bishop v. Wood,* 426 U.S. 341, 349-350, 96 S. Ct. 2074, 2079-2080, 48 L.Ed.2d 684 (1976).

* * * *

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Cf. *Bishop v. Wood, supra,* 426 U.S., at 349-350, 96 S. Ct., at 2079-2080. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State."

Id. at 146.

The opinion of the Fifth Circuit in the case *sub judice,* although citing *Connick,* reaches a ruling in conflict with the original holding. The decision is a result of a misinterpretation of *Rankin v. McPherson,* 483 U.S. 378 (1987) by the Fifth Circuit. In *Rankin* a plurality of this Court held that a public employee discussing an attempted Presidential assassination had engaged in protected speech. The remark which resulted in the employee's termination—a desire for success of future assassins—was deemed to be protected because the context of the discussion touched a matter of public concern, i.e., the health of the President and the policies of his administration. In using the term "context" in *Rankin,* this Court

referred to the subject matter of the discussion in which the disputed speech occurs. In the case at bar, the Fifth Circuit has misconstrued the definition of context expressed in *Rankin*. Whereas the term "context" in *Rankin* referred to the subject matter of the discussion in which the controversial statements were uttered, the Fifth Circuit held instead that irrespective of subject matter of the speech, any testimony before a governmental fact finding body is "a context that is inherently of public concern." p. 26a. This decision ignores the fact that the subject matter of the alleged protected speech did not pertain to a matter of public concern.

In the case at bar, the closed hearing conducted by the Commissioners Court, in its capacity as the governing body of the Flood Control District, did not pertain to a matter of public concern but was merely an intergovernmental concern of an individual employee—Marilon Speed. The nexus of Ms. Speed's contention is stated on page 3 of the transcript of this hearing (included in this brief as Appendix I) as follows: "Basically I was dismissed for doing my job. The union did not like the fact that I was feeding information to my supervisor." Ms. Speed further testified at this hearing that she was a timekeeper for a shop which employed ten mechanics, (p. 91a); that performance of her timekeeping function had resulted in friction with the union (p. 77a) and, that her firing by a review committee was not justified in that her supervisor, Carl Johnston, was satisfied with her job performance which she believed was adequate although she had disputes with personnel with whom she worked. Respondent, Carl Johnston, testified that a union clique was out to get Speed (p. 98a); that union personnel had generated a petition about her;

that as her supervisor he was satisfied with her performance, but she was fired by a committee which was supposed to review the decision of the supervisors rather than initiate firing. (p. 101a). After the testimony, Commissioners Court concluded the executive session of Commissioners Court and reinstated Speed to her job with two weeks lost wages as punishment. (pp. 106a-107a).

The Ruling of the Fifth Circuit holding that this testimony is protected speech is directly in opposition to the teachings of *Connick* which hold that only matters of public concern are protected.[4] The effect of this decision, if left undisturbed, will be to make any grievance hearing regarding a trivial personnel dispute a First Amendment action. Clearly, this was not the result this Court contemplated. The Court observed in *Connick* that the First Amendment does not "grant immunity for employee grievance not afforded . . . to those who do not work for the state".

Petitioners note that any protection for testimony at grievance proceedings is the proper subject for the state legislatures and that Texas has afforded to public employees such protection in certain instances, for example, the prohibition against retaliation for testimony in workers' compensation cases. Articles 8307c and 8309h, V.A.T.S. The decision of the Fifth Circuit holding testimony at a griev-

4. At minimum, this ruling creates a conflict between circuits since the Court in *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75 (4th Cir. 1988) held that it was irrelevant that the alleged protected speech was made in the course of an official hearing regarding allegations of discrimination. While *Arvinger* involved statements made to an investigator rather than testimony at a hearing, it directly differs with the Fifth Circuit by holding that context should not be elevated over content and restated that the focus is on whether the public or the community would be sincerely concerned with the particular expression.

ance hearing regarding an internal personnel matter not of public concern, has the effect of creating a cause of action for public employees on matters of personal interest; a result which is exactly contrary to the ruling of this Court in *Connick*. Accordingly, petitioners would request this Court to grant certiorari to review this issue and reverse the judgment of the Fifth Circuit holding petitioners liable under 42 U.S.C. § 1983.

CONCLUSION

For these various reasons, this petition for certiorari should be granted, and petitioners move this Court to reverse the portions of the Fifth Circuit Court of Appeals Judgment holding petitioners liable under 42 U.S.C. § 1983 and 42 U.S.C. § 2000e-3(a).

Respectfully submitted,

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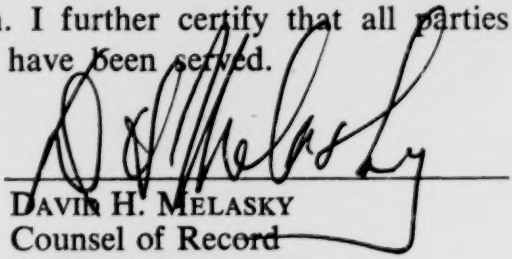
CERTIFICATE OF SERVICE

I, DAVID H. MELASKY, a member of the Bar of this Court, hereby certify that on this 18th day of September, 1989, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to J. Patrick Wiseman, Richards, Wiseman & Durst, 600 West 7th Street, Austin, Texas 78701, counsel for respondents herein. I further certify that all parties required to be served have been served.



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APPENDIX

APPENDIX A

Carl JOHNSTON,
Plaintiff-Appellee,

v.

HARRIS COUNTY FLOOD CONTROL DISTRICT, et al.,
Defendant-Appellant.

No. 87-2970.

United States Court of Appeals,
Fifth Circuit.

April 17, 1989.

Former county flood district employee brought civil rights suit against district and officials. The United States District Court for the Southern District of Texas, James DeAnda, Chief Judge, entered judgment in favor of employee, and defendants appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) attorney, who had been assistant county attorney and participated in coemployee's EEO hearing, did not have attorney-client relationship with county flood district, which was defendant in such proceeding, and thus, attorneys representing employee in civil rights suit against district did not violate ethical obligations and were not disqualified based on fact that they contacted attorney during discovery and called attorney as witness at trial; (2) district's firing of employee was not justified by district's alleged efforts to eliminate discrimination in work place; (3) injured public employee may pursue remedy under

§ 1983 as well as under Title VII when employer's conduct violates both Title VII and separate constitutional or statutory right; but (4) employee failed to use reasonable diligence in finding other, suitable employment, so that district court was required to reduce back pay award commensurate with time employee was not seeking other employment.

Affirmed in part and reversed and remanded in part.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, SNEED,* and WILLIAMS, Circuit Judges:

GEE, Circuit Judge:

Having been unsuccessful at trial, the defendants in this civil rights action raise a multitude of challenges to the district court's finding of liability. Their appeal requires us to review the district court's disposition of two pretrial issues, its finding of liability under Title VII and § 1983, its computation of damages and, finally, its award of attorney's fees. We affirm the district court's opinion on all issues save one, its computation of damages. Accordingly, we affirm in part and reverse in part, remanding the case for a recalculation of the damage award.

Carl Johnston (Johnston), the plaintiff in this case, began working for the Harris County Flood Control District (HCFD) as an hourly laborer in 1950. By 1977, Johnston had advanced to a supervisory position; he continued to work in that capacity until HCFD termi-

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* Circuit Judge of the Ninth Circuit, sitting by designation.

nated his employment in 1981. Johnston's tenure with HCFD was long but not always peaceful. The directors of HCFD received many complaints about Johnston over the years, including complaints that he exhibited racial bias and played favorites. Moreover, Johnston had problems with HCFD's purchasing procedures that resulted in equipment purchases exceeding Johnston's authority. Despite these difficulties, Johnston's position at HCFD appears to have remained secure.

In 1980, Marilon Speed, another HCFD employee, filed an Equal Employment Opportunity charge against HCFD. The Harris County Commissioner's Court convened an Equal Employment Opportunity hearing (the EEO hearing) to review Ms. Speed's allegations. Johnston testified at the hearing on behalf of Speed; his testimony was not favorable to HCFD and its directors. Embarrassed by Johnston's testimony, James B. Green, the director of HCFD, lashed out at Johnston with a series of retaliatory employment actions. HCFD's retaliatory efforts culminated when it attempted to force Johnston to accept a demotion. When Johnston refused, HCFD terminated his employment.

Johnston then filed this action against HCFD and its individual directors, alleging violations of Title VII, § 1983, federal age and handicap discrimination laws and a variety of state laws. The age and handicap discrimination claims and the state claims were dismissed before trial. After considerable jockeying, the case proceeded to trial. Johnston maintained that HCFD's scheme of retaliation violated both § 704(a) of Title VII and the First Amendment. HCFD insisted that Johnston's racial attitudes and poor performance provided legitimate,

non-retaliatory justifications for firing him. Rejecting HCFD's proffered justifications as pretextual, the court found HCFD liable under Title VII and § 1983 and awarded Johnston actual and punitive damages as well as attorney's fees. HCFD's appeal raises issues from every stage of the litigation; we review each of HCFD's challenges in turn.

1. Disqualification of Johnston's Counsel

Casting an unusual light on an attorney's ethical obligation to maintain his client's confidences, HCFD contends, without merit, that the district court erred when it denied HCFD's motion to disqualify Johnston's attorney's Office represents HCFD in legal matters. At the time of Marilon Speed's EEO hearing, Anthony Sheppard was an Assistant County Attorney. Sheppard attended and participated in the Speed EEO hearing, attended and participated in the Speed EEOC hearing, questioning witnesses and drawing up the Commissioner's Court's order. HCFD asserts that Sheppard represented HCFD at the EEO hearing, thus creating an attorney-client relationship between Sheppard and HCFD for purposes of the Speed matter. Johnston's attorneys contacted Sheppard during the discovery period of Johnston's action against HCFD and called Sheppard as a witness at trial. As a result, HCFD maintains, Johnston's attorneys caused Sheppard, HCFD's purported former counsel, to disclose information he learned while representing HCFD and, thus, to violate his ethical obligation to maintain HCFD's confidences. The district court denied HCFD's request to disqualify Johnston's attorneys three times; it was correct each time.

[1] On review of a motion to disqualify counsel, we review findings of fact for clear error "while carefully examining the district court's application of relevant ethical standards." *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526, 531 (5th Cir. 1981) (citations omitted); *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 171 (5th Cir. 1979) (citation omitted). In this Circuit, we do not mechanically apply the rule of disqualification. *Cossette*, 647 F.2d at 530 (citing *Church of Scientology v. McLean*, 615 F.2d 691, 692 (5th Cir. 1980)). Rather, we scrutinize the "precise nature of the relationship between the present and former representations." *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1029 (5th Cir. Unit B), *cert. denied*, 454 U.S. 895, 102 S. Ct. 394, 70 L.Ed.2d 211 (1981). A party seeking to disqualify opposing counsel on the ground of a former representation must establish two elements: 1.) an actual attorney-client relationship between the moving party and the attorney he seeks to disqualify and 2.) a substantial relationship between the subject matter of the former and present representations. *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341, 1345 (5th Cir. Unit A, 1981); *Duncan*, 646 F.2d at 1028. HCFD does not contend that *Johnston's attorney's* represented *HCFD* and, therefore cannot represent a party adverse to HCFD. Rather, HCFD maintains that Sheppard, one of Johnston's witnesses, represented HCFD and that the confidences and ethical obligations that arose in Sheppard's relationship with HCFD extend to Johnston's attorneys. Thus, we examine Sheppard and HCFD's relationship to determine whether any aspect of that relationship precludes Johnston's attorneys from interviewing Sheppard or from calling Sheppard as a witness.

[2] As HCFD and Sheppard did not have an attorney-client relationship with respect to the Speed EEO dispute, the district court did not err when it denied HCFD's motions to disqualify Johnston's counsel. HCFD ignores the "precise nature" of its relationship with Sheppard when it insists that an attorney-client relationship existed for the Speed EEO matter. At most, Sheppard's role in the Speed matter was ambiguous. Sheppard testified that he acted as an impartial figure at the hearing, performing a role analogous to that of an arbitrator or an impartial hearing officer. A review of the EEO hearing transcript reveals that Sheppard conducted the questioning, advised the Commissioner's Court, and drew up the Court's order. We cannot say precisely what function Sheppard performed, but we can say what function he did not perform: that of an advocate acting on behalf of HCFD—or of HCFD's individual officers or even of Marilon Speed. Furthermore, Sheppard's preparation for the hearing demonstrates that he did not act as HCFD's counsel. Before he attended the hearing, Sheppard explored the consequences of acting as an impartial participant instead of HCFD's advocate. Sheppard believed that, if the hearing did not resolve the dispute and Speed brought a civil action against HCFD, he could not represent HCFD in the civil action; a conflict of interest would arise if an attorney functioned as an impartial participant at one stage of a controversy but chose sides and acted as an advocate for one party at the next stage. Sheppard attended the EEO hearing under the assumption that his action would prevent him from representing HCFD in a future proceeding on the same dispute, an assumption incompatible with an attorney-client relationship. Finally, Sheppard's actions following the Speed hearing preclude

any conclusion that he and HCFD had an attorney-client relationship for the purposes of the Speed matter. When Ms. Speed felt that HCFD was violating the Commissioner's Court's order, she turned to Sheppard, who contacted HCFD, counselling it to comply with the order. If Sheppard was HCFD's attorney, it would be unusual for Ms. Speed to have sought his assistance to force HCFD to comply with the order or that Sheppard would offer such assistance. We cannot conclude that an attroney-client relationship existed and, thus, Sheppard was under no obligation to refrain from sharing the information he learned during the Speed dispute.

[3] Even if Sheppard and HCFD had an attorney-client relationship, however, we would affirm the district court. This case is analogous to *Brennan's, Inc. v. Brennan's Restaurants, Inc.* In *Brennan's,* a corporation split into two, competing entities. 590 F.2d at 170-71. The attorney for the original corporation chose to work for one of the new entities, severing his ties with the other. *Id.* When litigation arose between the two new entities, the attorney retained co-counsel. *Id.* We affrmed the first attorney's disqualification because of his former relationship with the original corporation. *Id.* at 172. The new co-counsel, however, was not necessarily subject to disqualification for two reasons: there was no previous attorney client relationship between the co-counsel and the original client and the information that the co-counsel learned from the disqualified counsel may not have been privileged, confidential or intended to remain undisclosed. *Id.* at 173-74. Similarly, the information Sheppard shared with Johnston's attorneys was not intended to be privileged, confidential or undisclosed. Rather, Sheppard gained his knowledge during a hearing that was a matter of

public record. Even assuming that Sheppard had a duty to protect HCFD's confidences in the Speed matter, no confidential information came to light at the public hearing. Johnston's attorneys were free to question Sheppard about the EEO hearing. As the district court did not abuse its discretion, we affirm its decision not to disqualify Johnston's counsel.

2. HCFD's Motion for Continuance

[4] Fifteen days before the trial began, HCFD requested a continuance on the ground that defendant Jordan, who had suffered a heart attack, was unable to attend trial. When the court ruled on HCFD's motion, Jordan's physician did not know when, if ever, Jordan would be able to appear. The court denied the motion and set the case for trial. On the first day of trial, HCFD again broached the subject of a continuance. Reminding the court that it was proceeding without one of the named defendants, HCFD presented the court with new information. According to a letter from Jordan's physician, postponing the trial for one month would be beneficial to Jordan's health. As the district court noted, the physician again did not indicate when, if ever, Jordan's health would permit him to attend trial. The court conducted the trial without Jordan, but held open the evidence until Jordan was able to testify. On appeal, HCFD contends that Jordan's presence was necessary to assist counsel in rebutting the testimony of Johnston's witnesses and that Jordan's absence was prejudicial. In addition, HCFD requested a thirty day continuance, a delay which it asserts was reasonable. HCFD urges that the court abused its discretion when it denied HCFD's motion to continue the trial. We disagree.

The district court did not err when it denied HCFD's motion for a continuance. The grant or denial of a continuance is within the sound discretion of the trial court. *Harmon v. Grande Tire Co., Inc.*, 821 F.2d 252, 256 (5th Cir. 1987) (quoting *Harvey v. Andrist*, 754 F.2d 569, 572 (5th Cir.), *cert. denied*, 471 U.S. 1126, 105 S. Ct. 2659, 86 L.Ed.2d 276 (1985)); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1193 (5th Cir. 1986) (footnote omitted). We will reverse the denial of a continuance "only when the action is, to use the conventional term, 'an abuse of discretion.'" *Fontenot*, 780 F.2d at 1193 (footnote omitted). All of the defendants except Jordan were present at trial and able to assist HCFD's counsel in formulating cross-examination questions and rebuttal testimony. HCFD has not shown that relying on the other defendants created any prejudice. Furthermore, a continuance would not require the court to wait a mere thirty days for Jordan's health to improve. If the court did not try the case in September 1985, it could not hear the case until the spring of 1986, a far longer delay than the thirty days HCFD suggests. Finally, the court held open the evidence until Jordan was able to testify and then heard his testimony. Given the lack of prejudice, the length of delay, and the court's generous efforts to accomodate Jordan, we cannot conclude that the district court abused its discretion.

3. Johnston's Title VII Claim

The district court held that HCFD violated § 704(a) of Title VII by retaliating against Johnston for his testimony at the Speed EEO hearing. HCFD advances several grounds for reversal, most of which merely assert that the district court's findings of fact are clearly erroneous.

First, HCFD contends that one of the court's findings was clearly erroneous. This error, we are told, induced it to misapply the causation standard for Title VI cases, creating an error of law subject to plenary review. Second, the district court allegedly failed to appreciate the significance of Johnston's history of racial bias, an error that, again, caused the court to misapply the causation standard and subject itself to plenary review. Finally, HCFD maintains that one of the court's findings of fact defeats its finding that HCFD's justification for terminating Johnston was pretextual. On reviewing the record, in none of these instances are we left with a definite and firm conviction that the district court erred and, thus, we affirm. We now consider these contentions in detail.

Section 704(a) of Title VII provides that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). An employee who sues under § 704(a) must prove a prima facie case of discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). Once the employee has met his prima facie burden, the burden of production shifts to the employer, who must articulate a legitimate, nondiscriminatory justification for his action. *McDonnell Douglass Corp. v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1973); *Parker v. Mississippi State Department of Public Welfare,* 811 F.2d 925, 929 (5th Cir. 1987). At this point, the factual inquiry proceeds to a new level of specificity, and the district court must decide whose explanation of the em-

ployer's motive it believes. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715, 103 S. Ct. 1478, 1481, 75 L.Ed.2d 403, 409-410 (1983); *Parson v. Kaiser Aluminum & Chemical Corp.,* 727 F.2d 473, 476 (5th Cir.), *cert. denied,* 467 U.S. 1243, 104 S. Ct. 3516, 82 L.Ed.2d 824 (1984).

> Ultimately, the employee must prove that there was a causal connection between the protected activity and the adverse employment decision. The connection required is causation-in-fact or "but for" causation. Whether or not there were other reasons for the employer's action, the employee will prevail only by proving that "but for" the protected activity she would not have been subjected to the action of which she claims.

Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir. 1984). On appellate review of a fully tried case, we do not concern ourselves with the shifting burdens of proof that are relevant at trial. *Id.* Rather, we limit our review to the district court's finding on the ultimate question of discrimination *vel non. Parker,* 811 F.2d at 929 (citations omitted); *Parson,* 727 F.2d at 476 (citations omitted).

[5] First, the district court made no clearly erroneous finding of fact that induced it to commit an error of law. Focusing on one phrase of one finding of fact, HCFD concludes that the entire finding of fact is clearly erroneous. HCFD argues that the district court premised its finding of retaliation on one phrase of Finding of Fact No. 2: Johnston "performed his job with approximately the same level of proficiency of other HCFD employees at his level." According to HCFD, the record

reveals serious, consistent problems with Johnston's job performance that render Finding of Fact No. 2 clearly erroneous.

When we read the phrase in context we cannot conclude that the district court committed clear error.

> [A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L.Ed. 746, 68 S. Ct. 525 [541] (1948) . . .
>
> If the district court's account of the evidence is plausible in light of the record viewed *in its entirety*, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985) (citations omitted) (emphasis added). Finding of Fact No. 2, in its entirety, states that "[a]lthough Plaintiff's job performance was in many ways deficient and/or problematic, Plaintiff performed his job with approximately the same level of proficiency as other HCFD employees at his level. Plaintiff was, generally, a loyal and competent employee of HCFD for over 30 years." The district court recognized that Johnston was not a model employee; it did not ignore the evidence of Johnston's difficulties with HCFD's purchasing procedures or the evidence of employee complaints about Johnston's super-

visory practices. Rather, the court concluded that Johnston was competent, albeit not perfect, a plausible view of the evidence that we decline to disturb as clear error.[1]

[6] Second, the district court did not underestimate Johnston's history of racial bias. HCFD contends that Johnston's problems with racial discrimination establish a legitimate, non-retaliatory justification for HCFD's actions and that the district court did not fully appreciate Johnston's racial tendencies. As a result, according to HCFD, the court again misapplied the "but for" standard of causation. When we read the district court's opinion in its entirety, we conclude that the court did not ignore or attempt to minimize Johnston's racial attitudes. In Finding of Fact No. 12 the court explained:

> Plaintiff, however, did have a long history of strained relations with minority employees and of favoritism toward certain employees, including Ms. Speed. In contrast, Defendants Green, Jordan, and Phipps had worked to improve employee relations at HCFD. Indeed, these Defendants exerted substantial efforts to cure employee dissatisfaction caused by Plaintiff's attitudes and policies, specifically Plaintiff's attitudes toward minority employees and favoritism toward certain employees.

In addition, the court accounted for Johnston's history of discrimination when it assessed damages, diminishing the punitive damage award in response Finding of Fact No. 12. A review of the entire record reveals that Johnston did engage in racially biased practices, that the court

1. HCFD's contention that the court misapplied the causation standard rests on a conclusion that Finding of Fact No. 2 is clearly erroneous. As we find no clear error, HCFD's analysis does not require us to review the district court's use of the causation standard.

was aware of those practices, and that the court concluded that HCFD did not terminate Johnston because of those practices. As the district court's view of the evidence is plausible, we cannot find clear error.

[7] Third, the district court did not defeat its own conclusions with its own findings of fact. Again, HCFD plucks from the district court's opinion one phrase of one finding of fact and scrutinizes it in the abstract, without reference to the opinion or the record as a whole. In Finding of Fact No. 12, the court found that Johnston had a history of strained relations with minorities *and* that HCFD had tried to cure the employee dissatisfaction that Johnston caused. According to HCFD, the finding that HCFD attempted to ease the racial tensions that Johnston caused defeats the court's finding of pretext. We disagree. Although HCFD may have tried to ease the tensions in its workforce, it tolerated Johnston's racial biases until it became convenient to find them intolerable. HCFD did not fire Johnston until he engaged in a practice that embarrassed HCFD, itself; HCFD cannot now hide behind its belated and feeble efforts to eliminate discrimination in the workplace in an effort to escape Title VII liability.

In a final challenge to its liability under Title VII, HCFD asserts that the result in this case condemns it to a position between the proverbial rock and hard place. As HCFD correctly explains, an employer is subject to Title VII liability for the discriminatory acts of its supervisory personnel. Had HCFD retaied Johnston, it may have incurred liability to other employees for Johnston's discriminatory acts, a risk HCFD now is unwilling to bear. In this case, however, the district court found a Title VII violation when HCFD *fired* Johnston. Whether

HCFD fired or retained Johnston, HCFD contends, Title VII liability was certain to arise. We express no opinion whether Johnston's racial biases would have provided permissible grounds for firing him or whether HCFD employees would have a colorable Title VII claim based on Johnston's racial biases. Neither of those cases is before us. In the case that is before us, an employer tolerated a supervisor whose racial attitudes and practices created difficulties in the workforce. When it became desirable to terminate the supervisor, his racial attitudes suddenly became intolerable. HCFD had accepted Johnston's attitudes and the liability risk they created for many years. The trial court could easily conclude that, having done so, it cannot now cloak itself in principles of nondiscrimination—principles that it once chose to ignore—in an effort to shield itself from Title VII liability. We affirm the district court's finding that HCFD violated § 704(a) of Title VII.

4. Johnston's § 1983 Claim

HCFD urges us to reverse the district court's award under § 1983, advancing two grounds for reversal, each without merit. First, HCFD insists that Johnston cannot pursue remedies under both Title VII and § 1983. Second, it maintains, even if Johnston may avail himself of both remedies, the First Amendment does not protect his testimony before the Commissioner's Court. We disagree on both counts and affirm the district court's award under § 1983.

a. *The Relationship Between Title VII and § 1983*

[8] Characterizing Johnston's claim as merely a claim for violation of § 704(a) of Title VII, HCFD maintains that Title VII preempts Johnston's § 1983 action. HCFD reminds us that Title VII provides the exclusive remedy

for a violation of its own terms. Although HCFD's statement of the law is correct, it is incomplete. Title VII *is* the exclusive remedy for a violation of its own terms. But when a public employer's conduct violates both Title VII and a separate constitutional or statutory right, the injured employee may pursue a remedy under § 1983 as well as under Title VII. Moreover, HCFD misconstrues the nature of Johnston's § 1983 claim by assuming that retaliation for testimony at an EEO hearing violates only Title VII. HCFD's conduct was illegal for two reasons: it violated Title VII and it infringed Johnston's right to testify freely, one that is protected under the First Amendment, as we shall discuss. Because the predicate for Johnston's § 1983 claim was a right independent of the right Title VII creates, Johnston was entitled to pursue remedies under both statutes.

Section 1983 provides that any person who, under color of state law, deprives another of "any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. § 1983. Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates. Thus, an underlying constitutional or statutory violation is a predicate to liability under § 1983. In *Irby v. Sullivan,* we held that Title VII is the exclusive remedy for a violation of the terms of Title VII. 737 F.2d 1418, 1428 (5th Cir. 1984). Title VII *does* create rights secured by the laws of the United States, as § 1983 requires. Section 1983, however, is not an available remedy for deprivation of a statutory right when the statute, itself, provides an exclusive remedy for violations of its own terms. *Id.* (citing *Pennhurst State School & Hospital v. Halderman,*

451 U.S. 1, 28, 101 S. Ct. 1531, 1545, 67 L.Ed.2d 694 (1981); *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1, 19-20, 101 S. Ct. 2615, 2626, 69 L.Ed.2d 435 (1981); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150 n. 5, 90 S. Ct. 1598, 1604 n. 5, 26 L.Ed.2d 142 (1970)). Consequently, a violation of § 704(a) of Title VII, alone, will not constitute an underlying statutory violation for purposes of imposing liability under § 1983. *Id.; accord, Day v. Wayne CountyBoard of Auditors,* 749 F.2d 1199, 1205-1205 (6th Cir. 1984); *see also, Great American Savings and Loan v. Novotny,* 442 U.S. 366, 377, 99 S. Ct. 2345, 2351, 60 L.Ed.2d 957, 967 (1979).

When a public employer's conduct violates both Title VII and a right secured by the constitution or by a statute, the boundary between areas of liability is not so neatly marked. Title VII is silent on the issue and the Supreme Court has yet to decide whether or to what extent Title VII and § 1983 provide overlapping remedies. The Court's efforts to reconcile Title VII with other statutory remedies do, however, inform our inquiry. In *Alexander v. Gardner-Denver, Co.,* the Court held that a private employee does not forfeit his remedy under Title VII if he also pursues an employment grievance under a collective bargaining agreement. 415 U.S. 36, 47-49, 94 S. Ct. 1011, 1019-20, 39 L.Ed.2d 147, 158 (1974). In reaching its conclusion the Court explained that "legislative enactments in this area [employment discrimination] have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Id.,* 415 U.S. at 48, 94 S. Ct. at 1019, 39 L.Ed.2d at 158. As examples of remedies that parallel or overlap Title VII, the Court specifically referred to § 1983 and § 1981. *Id.*

at 47 n. 7, 94 S. Ct. at 1019 n. 7, 39 L.Ed.2d at 158 n. 7. Finding that Title VII and § 1981 are "separate, distinct and independent" remedies, the Court has concluded that filing a Title VII claim does not toll the statute of limitations for a § 1981 action based on the same facts. *Johnson v. Railway Express Agency,* 421 U.S. 454, 461, 95 S. Ct. 1716, 1720, 44 L.Ed.2d 295, 302 (1975). As it discussed the relationship between Title VII and § 1981, the Court noted that "despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." *Id.* at 459, 95 S. Ct. at 1719, 44 L.Ed.2d at 301 (citations omitted). Rather, the legislative history of Title VII reveals that " 'the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and . . . the two procedures augment each other and are not mutually exclusive.' " *Id.,* at 459, 95 S. Ct. at 1720, 44 L.Ed.2d at 301. (quoting HR Rep. No. 92-238, p. 19 (1971)).

In contrast, the Court held in *Brown v. General Services Administration* that Title VII and § 1981 do not provide overlapping remedies for federal employees. 425 U.S. 820, 96 S. Ct. 1961, 48 L.Ed.2d 402 (1976). Again, the Court delved into Title VII's legislative history, this time concluding that for federal employees Congress intended to create an "exclusive, preemptive administrative and judicial scheme for the redress of employment discrimination." *Id.* at 829, 96 S. Ct. at 1966, 48 L.Ed. 2d at 409. From *Alexander, Johnson* and *Brown* we can conclude that Title VII overlaps some, but not all, statu-

tory remedies for discriminatory employment practices. Moreover, the Court has instructed us, by example, to consult Congress's intentions to determine whether Title VII overlaps or preempts a public employee's cause of action under § 1983. *Keller v. Prince George's County,* 827 F.2d 952, 957 (4th Cir. 1987).

As the Supreme Court has explained, the "legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes," including §§ 1983 and 1981. *See, Johnson,* 421 U.S. at 459, 95 S. Ct. at 1719, 44 L.Ed.2d at 301 (citation omitted); *Alexander,* 415 U.S. at 47-48 and n. 7, 94 S. Ct. at 1019 and n. 7, 39 L.Ed.2d at 158 and n. 7. In *Keller v. Prince George's County,* the Fourth Circuit held that Title VII does not preempt a state employee's remedy under § 1983 for employment practices that violate both Title VII and the Fourteenth Amendment. In reaching its conclusion, the court undertook a comprehensive review of the Title VII's legislative history. *Keller,* 827 F.2d at 958-62. In 1972, Congress amended Title VII to eliminate the exemption for state and local employers. *Id.* at 958 (citations omitted). As the bill travelled the arduous path through the House and the Senate, whether Title VII would be an exclusive remedy became a matter of intense debate. *Id.* at 958-60 (citations omitted). In its original form, the bill did not affect state and local employees' remedies under § 1983 or § 1981. *Id.* at 958 (citations omitted). After some debate, however, the House drafted a substitute bill, providing that Title VII was the exclusive remedy for discriminatory employment practices. *Id.* at 959 (citations omitted). When the Senate turned its attentions to the bill, it con-

sidered and rejected on three occasions proposals to make Title VII an exclusive remedy. *Id.* at 959-60 (citations omitted). The amendments to Title VII that Congress finally adopted did not create an exclusive remedy. *Id.* (citations omitted). Rather, "Congress . . . reaffirmed the federal policy favoring a system of overlapping, and sometimes redundant, remedies . . ." *Id.* at 960. As the *Keller* court's detailed review of Title VII's legislative history reveals, Title VII supplements, rather than pre-empts, state and local employees' remedy under § 1983.

Our own decisions forshadowed today's holding. In *Nilsen v. City of Moss Point,* we discerned a general principle from *Johnson* and *Alexander*: use "of one procedural vehicle to vindicate a substantive right does not preclude employing a parallel procedural vehicle to vindicate the same substantive right." 701 F.2d 556, 561 (5th Cir. 1983) (en banc). Thus, had the plaintiff in *Nilsen* advanced both her Title VII and her § 1983 claim in the same lawsuit, the court "would have had no choice but to adjudicate" both claims. *Id.* at 563. More important, by omitting to advance her § 1983 claim with her Title VII claim, the plaintiff forfeited her § 1983 action; the doctrine of res judicata barred her from asserting her § 1983 claim in a subsequent lawsuit arising from the same facts. *Id.* By requiring public employees to advance both their Title VII and their § 1983 claims in one suit we effectively recognized that Title VII does not preclude an action under § 1983 arising from the same facts.

When plaintiffs have invoked Title VII, § 1983 and § 1981 in the same lawsuit, we have noted that "[i]n this Circuit, specific consideration of these alternate remedies for employment discrimination [§§ 1983 and 1981] is

necessary only if their violation can be made out on grounds different from those available under Title VII." *Parker,* 811 F.2d at 927 n. 3; *Parson,* 727 F.2d at 475 n. 1; *Page v. U.S. Industries,* 726 F.2d 1038, 1041 n. 2 (5th Cir. 1984); *Carpenter v. Stephen F. Austin State University,* 706 F.2d 608, 612 n. 1 (5th Cir. 1983); *Pegues v. Mississippi State Employment Service,* 699 F.2d 760, 762 n. 1 (5th Cir.), *cert. denied,* 464 U.S. 991, 104 S. Ct. 482, 78 L.Ed.2d 679 (1983); *Rivera v. City of Wichita Falls,* 665 F.2d 531, 534 n. 4 (5th Cir. 1982). In each of these cases, we declined to consider the plaintiffs' § 1983 or § 1981 claim, instead resolving only their Title VII claims. We have rejected, however, any notion that this line of cases has redesigned Title VII to create an exclusive remedy. In *Hernandez v. Hill Country Telephone Co-Op, Inc.,* we held that the cases do not stand for the proposition "that a claimant alleging racial discrimination in an employment setting is limited to recovery under Title VII." 849 F.2d 139, 142-43 (5th Cir. 1988); *accord, Gonzalez v. Public Health Trust,* 686 F.Supp. 898 (S.D. Fla. 1988).

Our interpretation of the relationship between Title VII and § 1983 does not disturb our holding in *Irby v. Sullivan.* Although Title VII supplements and overlaps § 1983, it remains an exclusive remedy when a state or local employer violates only Title VII. When, however, unlawful employment practices encroach, not only on rights created by Title VII, but also on rights that are independent of Title VII, Title VII ceases to be exclusive. At this point, § 1983 and Title VII overlap, providing supplemental remedies. All circuit courts that have had occasion to consider the issue have reached this same conclusion: *Ratliff v. City of Milwaukee,* 795 F.2d 612,

623 (7th Cir. 1986); *Alexander v. Chicago Park District*, 773 F.2d 850, 855-56 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095, 106 S. Ct. 1492, 89 L.Ed.2d 894 (1986); *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299, 301 (7th Cir. 1985); *Day v. Wayne County Board of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984); *Owens v. Rush*, 654 F.2d 1370, 1380 & n. 12 (10th Cir. 1981); *Vulcan Society of New York City Fire Department v. Civil Service Commission of New York*, 490 F.2d 387, 390 n. 1 (2d Cir. 1973). Moreover, our conclusion is consistent with the Supreme Court's opinion in *Novotny*, where the Court distinguished employment practices that encroach on "two 'independent' rights" from those that violate only the rights created by Title VII. *Novotny*, 442 U.S. at 378, 99 S. Ct. at 2352, 60 L.Ed.2d at 967.

[9] Because Johnston based his § 1983 action on a violation of an additional right that is independent of those falling under § 704(a) of Title VII, the district court correctly found HCFD liable under both § 1983 and Title VII. Johnston alleged and established that HCFD's conduct violated two independent rights: Johnston's right under Title VII to be free from retaliation for testifying at an EEO hearing *and* his right under the First Amendment to testify freely before the Commissioner's Court. HCFD insists that Johnston's action constitutes only a claim for unlawful retaliation under Title VII, an interpretation that ignores the rights to which Johnston was entitled when he testified. Under Title VII, Johnston was entitled to testify in the EEO proceeding without suffering an adverse employment action. Johnston's First Amendment rights are similar to his Title VII rights, but are independent of Title VII. The First Amendment, as we explain below, guarantees Johnston's

right to testify fully and truthfully before the Commissioner's Court. When HCFD retaliated against Johnston for exercising that right, it infringed a right that is independent of Title VII. Thus, the court properly imposed liability on HCFD both under Title VII and under § 1983.

b. *Johnston's Testimony As Protected Speech*

[10] HCFD contends that, even if Johnston may pursue remedies both under Title VII and under § 1983, Johnston's testimony before the Commissioner's Court will not support a § 1983 action based on a violation of the First Amendment. According to HCFD, Johnston's testimony is not protected speech and, thus, HCFD's retaliatory action did not violate a right guaranteed by the constitution, as § 1983 requires. Describing Johnston's speech as "testimony under oath in a proceeding before the Harris County Commissioner's Court," the district court held that the speech was protected by the First Amendment. HCFD filed a motion for a new trial on the § 1983 claim, asserting that the speech is not protected. In denying HCFD's motion, the district court explained its original ruling: Johnston's "speech was protected under the First Amendment not merely for its content but also due to the context in which it was given: testimony as a witness before a government fact-finding body hearing an official matter." On appeal, HCFD clings to its assertion that Johnston's speech is not protected. HCFD describes the Speed EEO hearing as a closed meeting of the Harris County Commissioners Court convened to review an issue of intragovernment concern involving only one employee. Johnston appeared at the hearing in his capacity as an individual employee, addressing only a personnel dispute between HCFD and

Speed. We conclude that Johnston's testimony was protected speech and affirm.

A state may not condition public employment on grounds that infringe on its employees' constitutionally protected right to freedom of expression. *Rankin v. McPherson,* 483 U.S. 378, ____, 107 S. Ct. 2891, 2896, 97 L.Ed.2d 315, 324 (1987); *Connick v. Myers,* 461 U.S. 138, 142, 103 S. Ct. 1684, 1687, 75 L.Ed.2d 708, 716-17 (1983); *Page v. DeLaune,* 837 F.2d 233, 237 (5th Cir. 1988). Determining whether a public employer has discharged an employee in violation of the First Amendment requires us to weigh competing interests; we balance the employee's interest, as a citizen, in commenting on issues of public concern against the state's interest, as an employer, in "promoting the efficiency of the public services it performs through its employees." *Rankin,* 483 U.S. at ____, 107 S. Ct. at 2896, 97 L.Ed. 2d at 324. As we strike this balance, our threshold inquiry is whether the employee's speech addressed a matter of public concern. *Id.,* 483 U.S. at ____, 107 S. Ct. at 2896, 97 L.Ed.2d at 324; *Connick,* 461 U.S. at 146, 103 S. Ct. at 1689, 75 L.Ed.2d at 719; *Page,* 837 F.2d at 237; *Brinkmeyer v. Thrall Independent School District,* 786 F.2d 1291, 1294 (5th Cir. 1986).[2] We do not review the employee's words in a vacuum. Rather, we decide whether speech addresses a matter of public con-

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2. If the employee's claim survives our initial inquiry, we examine two additional questions: first, whether the employee's speech was a a substantial factor in the employer's adverse employment decision and, second, whether the employer's interest in promoting the effciency of its public services outweighs the employee's interest in freedom of expression. *Rankin,* 483 U.S. at ____, 107 S. Ct. at 2898, 97 L.Ed.2d at 326; *Page,* 837 F.2d at 237. As HCFD contends only that Johnston's speech did not address an issue of public concern, we need not address these two additional questions.

cern with reference to the "content, form and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48, 103 S. Ct. at 1690, 75 L.Ed.2d at 720. The issue is one of law that we decide independently on appeal. *Rankin,* 483 U.S. at ____ & n. 9, 107 S. Ct. at 2897 & n. 9, 97 L.Ed.2d at 325 & n. 9; *Gonzales v. Benavides,* 774 F.2d 1295, 1300 (5th Cir. 1985), *cert. denied,* 475 U.S. 1140, 106 S. Ct. 1789, 90 L.Ed.2d 335 (1986).

[11] Johnston's testimony at the EEO hearing meets the public concern requirement. HCFD's description of Johnston's testimony is correct: Johnston testified about a personnel dispute between HCFD and one of its employees. In contrast, HCFD's conclusion that the testimony was not of public concern is incorrect, for HCFD ignores the context in which Josnston spoke. As a general rule, when a public employee speaks about matters that are of personal interest only, the speech does not address matters of public concern. *Connick,* 461 U.S. at 147, 103 S. Ct. at 1690, 75 L.Ed.2d at 720. Under certain circumstances, however, the context in which the employee speaks may be sufficient to elevate the speech to the level of public concern. For example, in *Rankin,* the context of employee's statement, alone, did not convey any thoughts of interest or concern to the public at large. Yet the Court held that the speech addressed a matter of public concern, stressing the context of the speech. *Rankin,* 483 U.S. at ____, 107 S. Ct. 2897-98, 97 L.Ed.2d at 325-26. The employee, so the Court holds, made a statement in the midst of a conversation about the policies of a presidential administration, a discussion that followed a news bulletin about a matter of heightened public attention. *Id.,* 483 U.S. at ____, 107 S. Ct. 2897-98, 97 L.Ed.2d at 325-26. The political context in which

the employee spoke was sufficient, said the Court, to elevate the speech to a matter of public concern—although it was in form a puerile expression of hope that the President of her country would be murdered.

[12] When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern. "Our judicial system is designed to resolve disputes, to right wrongs. We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth." *Reeves v. Claiborne County Board of Education,* 828 F.2d 1096, 1100 (5th Cir. 1987). We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state. If employers were free to retaliate against employees who provide truthful, but damaging, testimony about their employers, they would force the employees to make a difficult choice. Employees either could testify truthfully and lose their jobs or could lie to the tribunal and protect their job security. Those able to risk job security would suffer state-sponsored retaliation for speaking the truth before a body entrusted with the task of discovering the truth. *See Smith v. Hightower,* 693 F.2d 359, 368 (5th Cir. 1982). Those unwilling or unable to risk unemployment would scuttle our efforts to arrive at the truth. *Reeves,* 828 F.2d at 1100. Thus, a grand jury witness speaks on matters of public concern when he furnishes truthful information to the grand jury on a matter that the grand jury properly is investigating. *Neubauer v. City of McAllen,* 766 F.2d 1567, 1572-73 n. 5 (5th Cir. 1985). Likewise, when one state employee testifies in another employee's civil action against their mutual state employer, the witness's testimony constitutes

a matter of public concern for First Amendment purposes. *Reeves*, 828 F.2d at 1100-1101. *See also Smith*, 693 F.2d at 368 (holding that the First Amendment protects a witness's right to testify truthfully at a criminal trial.) The goal of grand jury proceedings, of criminal trials, and of civil trials is to resolve a dispute by gathering the facts and arriving at the truth, a goal sufficiently important to render testimony given in these contexts speech "of public concern."

Like testimony before a grand jury and before a district court, Johnston's testimony before the Harris County Commissioner's Court constitutes speech on a matter of public concern. The Commissioner's Court was acting, as the district court explained, as fact finding body hearing an official matter. The purpose of the hearing was to resolve Marilon Speed's employment dispute by gathering testimony and arriving at the truth. The Commissioner's Court, like the grand jury and the district court, has an important interest in the integrity of its fact finding process. If we were to permit HCFD to retaliate against employees who testify before the Commissioner's Court, we would chill the employees' willingness to testify freely and truthfully and would obstruct the Commissioner's Court's path to the truth. Given the context in which Johnston spoke, his testimony constitutes speech on a matter of public concern and, thus, was entitled to First Amendment protection. As the speech is protected, it properly formed the basis of Johnston's § 1983 action.

5. Damages

a. *Johnston's Duty To Mitigate His Damages*

[13, 14] As Johnston failed to mitigate his damages, the district court erred when it did not reduce Johnston's

back pay award in relation to the period in which he did not seek other employment. A successful Title VII plaintiff is entitled to back pay, subject to a statutory duty to minimize his damages. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231-32, 102 S. Ct. 3057, 3065-66, 73 L.Ed.2d 721 (1982); 42 U.S.C. § 2000e-5(g). This duty to mitigate required Johnston to use reasonable diligence in finding other, suitable employment. *Ford Motor Co.*, 458 U.S. at 231, 102 S. Ct. at 3065, 73 L.Ed.2d at 732; *Floca v. Homecare Health Services, Inc.*, 845 F.2d 108, 111 (5th Cir. 1988) (citation omitted). It is undisputed that after a certain time Johnston simply stopped looking for another job. Johnston described his job search at trial:

> Q. Had you tried to get a job, by the way?
>
> A. I talked to one man about some security work that was at that Mobay Plant on Sheldon Road there, hadn't even filled out an application because after I talked to him he told me that I didn't have enough education to handle it; and they wouldn't let me go out there on account I just had one eye; and I never went out. . . .
>
> Q. Is that what discouraged you from looking further?
>
> A. Yes, it did. I never looked any more.[3]

3. Feeling that a job search would be futile, Johnston explained "I don't feel like a man that's 59 years old and has had one lung and emphysema and bronchial trouble, just one eye, and not much education that there's not much need in me looking for a job." We express no opinion whether Johnston's understandable doubts about his employment prospects would have proved valid had he actually searched for a job. Nor do we consider whether Johnston could have obtained a position comparable to the one he attained after 30 years experience with HCFD. Certainly, Title VII's mitigation requirement does not mandate that plaintiffs "go into another line of work, accept

After this initial inquiry, Johnston did not try to obtain other employment and, thus, did not fulfill his duty to exercise reasonable diligence to mitigate his damages. Accordingly, we reverse the district court's award of back pay and remand with instructions to reduce the award commensurate with the time Johnston was not seeking other employment.

b. *Accounting For Tax Liability In The Damage Award*

When the district court recalculated Johnston's damages on remand, it also should clarify whether its award constitutes a personal injury-like award under § 1983 or a back pay award under Title VII. The district court found that Johnston's actual damages included lost wages, employment benefits, and pension benefits, for a total of $142,071 in actual damages. Noting that HCFD was liable under § 1983, the court fixed Johnston's actual damages for that cause of action at $142,071. Likewise, the court noted that HCFD incurred liability under Title VII and that Johnston's actual damages under Title VII also were $142,071. As Johnston was entitled to only one recovery, the court entered judgment against HCFD for $142,071 for all of Johnston's claims. The distinction between the § 1983 award and the Title VII award is important for federal income tax purposes.

Although the court did not expressly adopt Johnston's method of calculating damages, the sum that the court

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a demotion or take a demeaning position." *Ford Motor Co.*, 458 U.S. at 231, 102 S. Ct. at 3065, 73 L.Ed.2d at 732. If, however, a claimant makes no effort to obtain any type of employment, we need not consider, in the abstract, whether a comparable job would have become available.

awarded is the exact sum that Johnston calculated in his brief on damages. Johnston's expert on damages appears to have assumed that the award would be a back pay award. He computed the amount of back pay and future pension and benefit payments due to Johnston for each year and deducted the amount of federal income taxes due for each year. HCFD's expert also computed the amount of back pay and future pension and benefit payments due each year. When HCFD's expert accounted for federal income taxes, he added the amount of back wages owed to Johnston for each year to the amount Johnston actually received as income for each of those years, thus elevating Johnston to a higher tax bracket for the years in which he is entitled to back pay. Each party contends that its approach to the tax and damages question is correct. Neither party is entirely correct; whether the court's award properly accounts for Johnston's tax liability depends on the nature of the award.

[15] Damages received "on account of personal injuries or sickness" are exempt from federal income tax. 26 U.S.C. § 104(a)(2). Damages fall into § 104(a)(2)'s exemption if the plaintiff receives them through prosecution or settlement of an action based on "tort or tort-type rights." Income Tax Regs., § 1.104-1(c), 26 C.F.R. § 1.104-1(c). Relying on the Supreme Court's analogies between § 1983 and tort actions, the Third Circuit and the Tax Court have concluded that § 1983 is an action based on a "tort or tort-type" right. *Bent v. Commissioner of Internal Revenue,* 835 F.2d 67, 70 (3d Cir. 1987); *Metzger v. Commissioner of Internal Revenue,* 88 T.C. 834 (1987), *aff'd without op.,* 845 F.2d 1013 (3d Cir. 1988). As a result, damages awarded under § 1983 are

tax-free. *Bent,* 835 F.2d at 70; *Metzger,* 88 T.C. at 858. The award remains exempt even if the court considered lost earnings as an element of damages in a § 1983 action. *Bent,* 835 F.2d at 70. On the other hand, damages that constitute a back pay award under Title VII are not exempt under § 104(a)(2). *Hodge v. Commissioner of Internal Revenue,* 64 T.C. 616 (1975). At least for purposes of FICA (Social Security) taxes, a plaintiff receiving a back pay award is liable for the taxes that would have accrued in the year the wages were due. *Bowman v. United States,* 824 F.2d 528, 530 (6th Cir. 1987).

[16] The tax-free nature of a damage award determines whether and how a district court should account for tax liability when it computes the award. Because they are tax-free, personal injury awards based on lost earnings "ideally" should reflect the plaintiff's after-tax wages and benefits. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 534, 103 S. Ct. 2541, 2549, 76 L.Ed.2d 768, 787 (1983) (citation omitted). A personal injury award that accounts for the plaintiff's tax liability accurately reflects the amount that the plaintiff actually lost. An award that does not account for tax liability would grant a windfall to the plaintiff; he would receive, tax-free, an amount normally subject to taxes. When the court accounts for the tax liability, it may, as the district court did here, compute the taxes due on the wages that form the basis of the award. The court need not examine the plaintiff's actual income and speculate as to his actual tax liability after the back pay award is added to the actual income. The purpose of acccounting for taxes is not to arrive at a precise determination of the plaintiff's tax liability; it is to account for factors that may reduce

the plaintiff's actual loss. Absolute precision is not necessary. Thus, if the court concludes that its award is one under § 1983, it correctly accounted for Johnston's tax liability.

In contrast, the court need not account for federal income tax liability when it fixes back pay awards. *Rasimas v. Michigan Department of Mental Health,* 714 F.2d 614, 627 (6th Cir. 1983), *cert. denied,* 466 U.S. 950, 104 S. Ct. 2151, 80 L.Ed.2d 537 (1984); *Curl v. Reavis,* 608 F.Supp. 1265, 1269 (W.D.N.C. 1985). The award is not tax-exempt; the plaintiff must pay the taxes due on the wages for the year in which the wages were due. We decline to require district courts to act as tax consultants every time they grant back pay awards, speculating as to what deductions and shelters the plaintiff will find, and then calculating the plaintiff's potential tax liability. *See Curl,* 608 F.Supp. at 1269. If the district court finds that its award is purely back pay, then it must recalculate the award, eliminating any reduction for federal income tax liability.

c. *Use Of Statistical Life Expectancy Tables To Calculate Damages*

[17] The district court did not err when it based its damage award on statistical life expectancy tables. In general, statistical life expectancy is the basis for our damage computations. As we explained in *Madore v. Ingram Tank Ships*:

> The phrase "work-life expectancy" literaliy reflects its meaning: the average number of years that a person of a certain age will both live and work. Such an average is not conclusive. It may be shown

> by evidence that a particular person, by virtue of his health or occupation or other factors, is likely to live and work a longer, or shorter, period than the average. Absent such evidence, however, computations should be based on the statistical average.

732 F.2d 475, 478 (5th Cir. 1984) (citations omitted). HCFD has not provided us suffcient evidence to warrant departure from the statistical averages. Dr. Huddle, Johnston's expert witness, based his damage calculations on standard life expectancy tables. HCFD relies on a brief, conclusory statement by Dr. Friedman, HCFD's medical expert, to conclude that Dr. Huddle should not have relied on statistical averages. When asked his opinion on Johnston's life expectancy, Dr. Friedman replied "[i]t's difficult to say. He, between 1971 and 1984, has shown significant decrease in his breathing capacity. I would—because he also has heart disease as well, I would think that his life expectancy might be eight to ten years." Dr. Friedman neither based his projection on reasoned analysis of Johnston's actual conditions, nor provided the court with any firm evidence as to how or to what extent Johnston's health would diminish his life expectancy. Dr. Friedman's testimony amounts to an off-the-cuff estimate rather than an opinion based on a careful analysis of the facts of the case. Dr. Hill, HCFD's economic expert, merely adopted Dr. Friedman's conclusion without examining independently any facts that would render the statistical averages inappropriate.

Moreover, Dr. Friedman's own testimony belies his conclusion. Most men suffering Johnston's medical condition may well have a life expectancy that is less than the statistical average. Dr. Friedman testified that Johnston was totally disabled by 1971, but had continued to

work until 1984, a "valiant effort" that most men in Johnston's condition would not be capable of making. For 13 years Johnston exceeded medical expectations of his ability to work; we cannot conclude, on the basis of Dr. Friedman's conclusory statement, that Johnston will cease to do so. We express no opinion on what would be a reasonable medical estimate of Johnston's life expectancy. We simply hold that Dr. Friedman and Dr. Hill's testimony does not provide us with a reasoned basis for departing from the statistical averages that Dr. Huddle and the district court used.

d. *Social Security Benefits*

[18] The district court did not err by refusing to deduct from Johnston's back pay award the amount that he received in social security disability benefits. The decision whether to deduct unemployment compensation benefits from a back pay award is left to the trial court's discretion. *Johnson v. Chapel Hill Independent School District,* 853 F.2d 375, 382 (5th Cir. 1988). We conclude that the district court also may exercise its discretion in deciding whether to deduct social security disability benefits from back pay awards. HCFD offers no reason why the district court abused its discretion in this case and we find none in our own review of the record.

6. The District Court's Award Of Attorney's Fees

[19] HCFD raises a myriad of challenges to the award of attorneys fees, most of which ignore the district court's careful scrutiny of the fee application as well as the court's findings of fact. For convenience, we group HCFD's complaints about the award into four areas: the court's refusal to exclude 1.) time for issues that Johnston dis-

missed before trial; 2.) time that purportedly reflects a duplication of effort; 3.) attorney time that was more properly paralegal time; and 4.) time that was excessive. Reviewing each contention in turn, we hold that the court neither abused its discretion nor based its award on any clearly erroneous findings of fact. We affirm the court's award of attorneys fees in the amount of $134,-021.15.[4]

Recognizing the "district court's superior understanding of the litigation," we have committed the award of attorneys fees to its discretion. *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L.Ed.2d 40, 53 (1983); *Leroy v. City of Houston,* 831 F.2d 576, 584 (5th Cir. 1987), *cert. denied,* ____U.S.____, 108 S. Ct. 1735, 100 L.Ed.2d 199 (1988); *Curtis v. Bill Hanna Ford, Inc.,* 822 F.2d 549, 551 (5th Cir. 1987) (citations omitted). Thus, we will disturb the court's total award of attorney's fees only if the court abused its discretion. *Leroy,* 831 F.2d at 584; *Curtis,* 822 F.2d at 551. We review the facts underlying the court's calculation of the award by the clearly erroneous standard. *Leroy,* 831 F.2d at 584; *Curtis,* 822 F.2d at 551. With these principles in mind, we turn to each of HCFD's challenges to the fee award.

The district court's award does not improperly compensate Johnston's attorneys for time that they spent on issues that were dismissed before trial or that proved fruitless. HCFD points out that Johnston's age and handicap discrimination claims were dismissed before trial, as were his state claims. As a result, HCFD urges us to

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4. The court also awarded $10,861.58 in costs, an award that HCFD does not contest on appeal and that we do not disturb.

exclude the time that Johnston's attorneys spent in pursuit of the unsuccessful claims. When an attorneys fee applicant has prevailed on some, but not all, of his claims, we consider "whether the plaintiff prevailed on the central issue by acquiring the primary relief sought." *Texas State Teachers Association v. Garland Independent School Dist.*, 837 F.2d 190, 192 (5th Cir. 1988), *cert. granted*, ____ U.S.____, 109 S. Ct. 51, 102 L.Ed.2d 30 (1988). Even if the plaintiff prevailed on his central issue, acquiring primary relief, he is not entitled to attorneys fees for time spent pursuing claims that are distinctly different from the central, successful claim. *Hensley*, 461 U.S. at 442, 103 S. Ct. at 1944, 76 L.Ed.2d at 56. In this case, the court did not err when it declined to exclude time that Johnston's attorneys spent in pursuit of claims that eventually were dismissed. The court found that

> [Johnston's] counsel expended an enormous amount of time on the case, however, the results were excellent. . . . [W]hile [Johnston] did not recover on his age and handicap claims, it was defendants who injected fact issues on [Johnston's] age and infirmity into the case. . . . The court found that any reliance by defendants on plaintiff's age or infirmity in their treatment of plaintiff was pretextual only. . . . Nonetheless, [Johnston's] attorneys cannot be faulted for addressing issues raised by defendants. Furthermore, as issues of age and infirmity were part of defendants' articulated reason for terminating [Johnston], these issues are integrally bound up with [his] retaliation claims.

HCFD offers no reason why this finding is clearly erroneous and we find none on our review of the record.

[20] Likewise, the court's finding that Johnston's attorneys did not unduly duplicate attorney time is not

clearly erroneous. The court made a specific finding of fact on this issue, noting that "there was no undue duplication of effort among [Johnston's] attorneys." HCFD advances two reasons why the court's award includes time for duplicated efforts, but fails to establish clear error. First, HCFD maintains that the court's decision to accept all of the hours that Johnston's counsel submitted evinces a failure to scrutinize the records for duplicitious time. Contrary to HCFD's allegations, the court did not accept without question all of the time that Johnston's attorneys submitted. Attorney Colton failed to itemize his time, to submit a supplemental affidavit or to attend the fee hearing. Accordingly, the district court refused to award Attorney Colton any of the fees he requested. Moreover, even if the court had accepted every moment of the attorneys' requested time, we could not conclude that its finding of fact was clearly erroneous without some indication in the record that Johnston's attorneys did duplicate their time. HCFD makes no such showing. We decline to conclude that accepting as reasonable all of the time an attorney has submitted automatically renders the court's finding clearly erroneous.

Second, HCFD contends, again without merit, that two of the attorneys' methods for staffing the case necessarily resulted in duplication. HCFD finds duplication in the number of plaintiff's attorneys who attended the trial. According to HCFD, three attorneys attended each day of trial but only two attorneys actually participated in the trial. HCFD does not explain what the third attorney did during the trial, nor does it suggest that the third attorney made no contribution to the trial team's efforts or that he did the same work that the other two attorneys

did. HCFD also complains about the allocation of attorney time for depositions and trial testimony. For six witnesses, one of Johnston's attorneys conducted the pretrial deposition but another examined the witness at trial. Without pointing to any efforts that the attorneys actually duplicated, HCFD asserts that this practice necessarily resulted in duplicated efforts. Again, we decline to find that the court committed clear error without some indication from the record that the attorneys duplicated their time. Overall, the record indicates that Johnston's attorneys made admirable efforts to minimize the cost of this litigation. The court found that the attorneys left much of the pretrial preparation to young, and thus less expensive, attorneys and that they delegated legal research and paralegal work to law clerks—both practices that minimized the cost of pursuing Johnston's claim.

Next, the district court did not improperly compensate Johnston's attorneys for work that they should have delegated to a paralegal. On review of a fee application, the district court must consider "whether the work performed was 'legal work in the strict sense' or was merely clerical work that happened to be performed by a lawyer." *Abrams v. Baylor College of Medicine,* 805 F.2d 528, 536 (5th Cir. 1986) (quoting *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717 (5th Cir. 1974)). The district court found that "all hours claimed as attorney hours are for legal work. Plaintiff's attorneys did not seek attorney's fees for clerical-type work. Though some of the work done by plaintiff's attorneys arguably could have been done by paralegals, the fact that this work was done by the attorneys will not diminish the fee award as their efforts enhanced their trial preparation." HCFD finds only one example of time better spent by a para-

legal: several hours that Attorney Mandleka-Fowler spent annotating a deposition. We cannot conclude that the court committed clear error when it found that this type of activity contributed to the attorney's trial preparation.

Finally, HCFD's complaint that the court awarded fees for an excessive amount of time is without merit. The court reviewed each attorney's time and, with the exception of Attorney Colton's time, found that the time was reasonable. The court then reviewed the fee request under the 12 factors that we set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 718-19 (5th Cir. 1974). HCFD raises two primary objections to the hours expended. First, HCFD's expert on attorneys fees spent more time reviewing the record than Johnston's expert spent. Presumably, HCFD would have us conclude that its expert is more credible than Johnston's. The district court, however, found otherwise, explaining that "[Johnston's] expert on attorney's fees, a well-known civil rights attorney, testified [Johnston's] attorney's fees were reasonable and in accordance with fees awarded in similar cases. Defendant's expert objected to this conclusion, however, [Johnston's] expert was an attorney of far greater experience in these matters and the court gives his opinion the greater weight as to this factor." The mere fact that it took one expert longer than another to form an opinion does not render one opinion inherently more credible than the other. We are reluctant to disturb as clearly erroneous a finding of fact that the district court based on the credibility of the witnesses.

[21] Second, HCFD characterizes the case as a single plaintiff case that did not raise any complicated issues of law and, thus, did not warrant an extensive investment of attorney time. HCFD again has ignored the district

court's findings. The court concluded that Johnston's Title VII and § 1983 claims were straight-forward, but that several other factors complicated the lawsuit. Moreover, as Johnston points out, HCFD contributed to the length and complexity of the case by engaging in delaying tactics during discovery and by advancing repeated motions to disqualify counsel. The court's finding that the hours were reasonable is not clearly erroneous.[5]

Having reviewed each of HCFD's many claims of error, we affirm all of the district court's findings and conclusions except for its computation of damages. Accordingly, we AFFIRM in part and REVERSE in part, remanding for a recalculation of the damages award.

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5. HCFD also raised two picayune issues. First, it points out that one attorney's time sheet for one day includes 31.5 hours, a superhuman feat—or perhaps a clerical error. HCFD failed to present this billing problem to the district court and we decline to make an independent review of it on appeal. Second, HCFD contends that Attorney Acosta's time is excessive because she did not verify her own time sheets. Certainly, we do not condone the practice of submitting time sheets when the attorney who expended the time has not reviewed them for accuracy. The district court, however, was aware that Attorney Nelson verified Attorney Acosta's time sheets and the court did not consider them unreliable; we decline to do so on appeal.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2970

CARL JOHNSTON,
Plaintiff-Appellee,

v.

HARRIS COUNTY FLOOD CONTROL
DISTRICT, ET AL.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(May 22, 1989)

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
Thomas Gibbs Gee
United States Circuit Judge

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-120

HARRIS COUNTY FLOOD CONTROL DISTRICT, ET AL.,
Petitioners

v.

CARL JOHNSTON

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 19, 1989.

/s/ BRYON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 16th
day of August, 1989.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-2729

CARL JOHNSTON

v.

HARRIS COUNTY FLOOD CONTROL DISTRICT, ET AL.

(Filed December 16, 1986)

MEMORANDUM AND ORDER

Plaintiff, Carl Johnston, alleges that Defendants entered into a conspiracy to retaliate against him for his testimony on behalf of a Harris County Flood Control District employee, Marilon Speed, at her Equal Employment Opportunity hearing before the Harris County Commissioner's Court. Plaintiff alleges numerous acts of retaliation which caused him mental and physical anguish and ultimately resulted in his termination from his employment with the Harris County Flood Control District (hereinafter HCFD). Plaintiff asserts claims under 42 U.S.C. § 2000(e) and 42 U.S.C. §§ 1983 and 1985 for retaliation, 29 U.S.C. § 794, and 31 U.S.C. § 6716 for discrimination against him as a handicapped person, and pendent state law claims.

Having reviewed the evidence presented at trial, weighed the credibility of the witnesses, and reviewed

the applicable law, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff was employed by the Harris County Flood Control District from January 23, 1950 to June 12, 1981. For approximately the last 14 years of his employment, Plaintiff served in supervisory positions. From March 1, 1977 to the date of his termination, Plaintiff held the title of Superintendent of Shops. The Superintendent of Shops is in charge of maintenance of HCFD equipment.

2. Although Plaintiff's job performance was in many ways deficient and/or problematic, Plaintiff performed his job with approximately the same level of proficiency as other HCFD employees at his level. Plaintiff was, generally, a loyal and competent employee of HCFD for over 30 years.

3. Plaintiff testified on behalf of Marilon Speed at her Equal Employment Opportunity hearing before the Harris County Commissioner's Court on July 24, 1980.

4. Plaintiff's testimony proved to be an embarrassment to the HCFD and, in partculiar, its Director, James B. Green, and Mr. M. E. Jordan, two of the Defendants herein.

5. Prior to the hearing, Defendant Green had numerous complaints with Plaintiff's job performance but was satisfied to allow him to continue in his current position without any adverse action against him.

6. After the hearing, Defendant Green became determined to remove Plaintiff from his position in retaliation for his testimony.

7. Defendant Green knowingly and deliberately began a pattern of retaliation against Plaintiff which included the following acts:

a) removing Plaintiff from his responsibilities as Superintendent of Shops to assignment of *ad hoc* projects, including at times clerical projects and, at other times, strenuous field work;

b) removing Plaintiff from his regular office and reassigning him to less desirable work environments, including, for a time, a small room used primarily to house a copying machine;

c) denying Plaintiff the 12 percent pay increase which was granted to all county employees on March 1, 1981;

d) ostracizing Plaintiff by pressuring other HCFD employees not to associate with Plaintiff while at work;

e) attempting to force Plaintiff to accept a demotion; and

f) terminating Plaintiff's employment upon his refusal to accept a demotion.

8. But for Plaintiff's testimony at the hearing he would not have suffered these indignities. Plaintiff would not have been terminated but for his testimony at the hearing.

9. Defendant Green was at all relevant times the Director of HCFD, and as such was in charge of the daily management and operations of the HCFD.

10. Defendant Jordan, at all relevant times an employee of HCFD, knowingly and deliberately conspired with Defendant Green to retaliate against Plaintiff and participated directly or indirectly in each of the above-

mentioned acts of retaliation. Defendant Jordan, however, was Green's subordinate, acted primarily at Green's direction, and is less culpable than Green.

11. Defendant Phipps, at all relevant times an employee of HCFD, knowingly and deliberately conspired with Defendants Green and Jordan to retaliate against Plaintiff. Defendant Phipps was Green's subordinate, acted primarily at Green's direction, and is less culpable than Defendant Green.

12. Plaintiff, however, did have a long history of strained relations with minority employees and of favoritism toward certain employees, including Ms. Speed. In contrast, Defendants Green, Jordan, and Phipps had worked to improve employee relations at HCFD. Indeed, these Defendants exerted substantial efforts to cure employee dissatisfaction caused by Plaintiff's attitudes and policies, specifically Plaintiff's attitudes toward minority employees and favoritism toward certain employees.

13. Plaintiff was at all relevant times over forty years of age.

14. Plaintiff has only one lung and suffered from a physical impairment due to lung disease at all relevant times.

15. Plaintiff, however, concealed his lung condition from his employer, and Defendants did not know the full extent of his impairment.

16. Defendants never deliberately sought to cause Plaintiff physical injury, and Defendants never negligently caused Plaintiff physical injury.

17. Any physical injuries suffered by Plaintiff due to

strenuous activities were caused by Plaintiff's own refusal to reveal the full extent of his physical impairment.

18. Plaintiff was physically able to perform his job as Superintendent of Shops.

19. Defendants never discriminated against Plaintiff due to his age or impairment, but rather Defendant's wrongful acts were at all times in retaliation for his testimony at the EEO hearing. References to Plaintiff's physical condition in Plaintiff's termination were pretextual only.

20. Had Defendants not caused Plaintiff to be terminated, Plaintiff would have continued in his job until age 62, at which time he would have voluntarily retired.

21. Had Defendants not wrongfully deprived Plaintiff of his 12 percent pay increase, he would have received that increase on March 1, 1981.

22. Plaintiff was unable to find other suitable employment due to his age and health.

23. Plaintiff's actual damages include lost wages, employment benefits, and pension benefits.

24. HCFD is an employer within the meaning of 42 U.S.C. § 2000e.

25. At all times all Defendants were acting within the scope and course of their employment with HCFD.

26. HCFD is a branch of Harris County. *Tex. Rev. Civ. Stat. Ann.* art. 8280-120 (Vernon's 1954).

27. The Harris County Commissioner's Court was at all relevant times the governing body of HCFD. *Tex. Rev. Civ. Stat. Ann.* art. 8280-120 (Vernon's 1954).

CONCLUSIONS OF LAW

1. The Court has jurisdiction over all of Plaintiff's claims under 28 U.S.C. §§ 1331, 1343, and the doctrine of pendent jurisdiction. All prerequisites to Plaintiff's claims under 42 U.S.C. § 2000e have been met.

2. 42 U.S.C. § 1983 provides that every person who, acting under color of State law, deprives any other person of his federal rights shall be liable to that person:

> By the plain terms of § 1983, two—and only—two allegations are required in order to state a cause of action under the statute. First, the Plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez v. Toledo, 446 U.S. 635, 640 (1980).

Here, Defendants Green, Jordan and Phipps are natural persons, and the HCFD is a person within the meaning of § 1983. *See Monnell v. Department of Social Services,* 436 U.S. 658 (1978); *VanOoteghem v. Gray,* 774 F.2d 1332, 1335 (5th Cir. 1985). Defendants Green, Jordan and Phipps undertook all of their actions against Plaintiff within the course and scope of the employment, and thus acted in their official capacities as employees of HCFD. Defendants' actions were thus under color of State law. *Monroe v. Pape,* 365 U.S. 167 (1961), *overruled in part on other grounds, Monell v. Department of Social Services,* 436 U.S. 658 (1978).

Under § 1983, HCFD cannot be vicariously liable for the unconstitutional acts of its employees. *Monell,* 436 U.S. at 691-95. Here, Defendant Green was the Director of HCFD, Defendants Jordan and Phipps were acting

at his direction, and all of their acts were undertaken in the scope and course of their employment. Defendant Green, as Director of HCFD, has authority over HCFD's daily operations. The Court cannot determine without a review of the record, however, whether sufficient evidence was adduced at trial to prove that Defendant Green had such authority that his acts constituted the acts of HCFD, and whether HCFD is liable under 42 U.S.C. § 1983 for Plaintiff's injuries. *See VanOoteghem,* 774 F.2d at 1336-38; *Crane v. State of Texas,* 759 F.2d 412, 427-30 (5th Cir. 1985), *modified,* 766 F.2d 193 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 570 (1985); *Quinn v. Syracuse Model Neighborhood,* 613 F.2d 438, 448 (2d Cir. 1980). *Compare Rhode v. Denson,* 776 F.2d 107 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 2891 (1986). The Court shall thus defer ruling on HCFD's liability under § 1983. If Plaintiff wishes to pursue his § 1983 claims against HCFD and Harris County, Plaintiff shall submit a transcript of the trial, specifically pointing out that evidence which supports HCFD's liability. Plaintiff shall submit a brief in support of his position with the transcript. Defendants may respond within 30 days of receipt of Plaintiff's brief.[1]

Defendants' retaliation was for Plaintiff's testimony under oath in a proceeding before the Harris County

1. HCFD is a branch of the county government of Harris County. Harris County had notice of the suit and indeed the County Attorney defended it. Thus, Harris County is liable to the extent HCFD is liable under § 1983. *See VanOoteghem,* 774 F.2d at 1335. *See also Tex. Rev. Civ. Stat. Ann.,* art. 8280-120 § 2(i) (Vernon's 1954). The Harris County Commissioner's Court is the governing body of HCFD and may sue or be sued in any case involving HCFD, and thus is liable to the extent HCFD is liable under § 1983. *Tex. Rev. Civ. Stat. Ann.,* art. 8280-120 § 2(i) (Vernon's 1954). The individual members of the Commissioner's Court, however, have no liability in their individual capacities.

Commissioner's Court. Plaintiff's testimony is clearly protected speech under the first amendment. *See generally Wilson v. Thompson,* 593 F.2d 1375, 1387 (5th Cir. 1979); *VanOoteghem v. Gray,* 654 F.2d 304, 305-306 (5th Cir. 1981), *cert. denied,* 455 U.S. 909 (1982), *appeal after remand,* 774 F.2d 1332 (5th Cir. 1985).

Thus, Defendants' acts of retaliation deprived Plaintiff of his federal rights under the first amendment. Therefore, Plaintiff has established his case on his § 1983 claim.

Defendants Green, Jordan and Phipps have raised the defense of qualified immunity from liability in their individual capacities. *See Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The Court first notes that neither HCFD nor the individual Defendants in their official capacities have any immunity from suit under § 1983. *Brandon,* 105 S. Ct. at 878-79. The defense of qualified immunity operates to protect public officials from suit for discretionary acts in their official capacities done in good faith. *Harlow,* 457 U.S. at 813-15, and n. 30. "Good faith," however, is determined by an objective standard, regardless of the subjective intent of the defendant. *Id.,* at 817-819 & n. 30. The test for qualified immunity is whether the defendant's conduct violated clearly established statutory or constitutional rights of the victim of which a reasonable man would have known. *Id.* Here, it is beyond question that a reasonable man would have known that retaliation against a person for giving testimony under oath before a government factfinding body is a constitutionally protected activity and that retaliation for giving such testimony violated the constitution and laws of the United States. Thus, Defendants are not shielded from individual liability by the doctrine of qualified immunity.

The Court thus concludes that Defendants Green, Jordan and Phipps are liable to Plaintiff for his actual damages under § 1983 in their official and individual capacities. The Court defers ruling on Defendants HCFD's and Harris County's liability to Plaintiff for his actual damages under § 1983. *See Brandon,* 105 S. Ct. at 878-79; *VanOoteghem,* 774 F.2d at 1335.

Finally, the Court has found that Defendant Green's conduct was knowing and willful. While the Court is of the opinion that some punitive damages must be awarded, the Court believes that such an award should be minimal due to the mitigating circumstances cited in finding of fact 12. The Court thus finds that Defendant Green, in his individual capacity, is liable to Plaintiff for $2,000.00 in punitive damages. The Court further finds Defendants Jordan's and Phipps' conduct was knowing and willful, although less culpable than that of Defendant Green because they acted primarily at his direction. The Court thus finds that Defendants Jordan and Phipps, in their individual capacities, are liable to Plaintiff for $1,000.00 each in punitive damages. The Court defers any finding on Defendants HCFD's and Harris County's liability for these damages at this time.

2. 42 U.S.C. § 1988 provides for attorneys' fees for the prevailing party in a § 1983 case. The Court finds Plaintiff prevailed on his § 1983 claims and is entitled to reasonable attorneys' fees. *See generally, Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). Plaintiff shall submit affidavits and briefs in support of its claim for attorneys' fees within 30 days of the date of this Order. Defendants may respond with counteraffidavits and opposing briefs within 30 days thereafter.

3. 42 U.S.C. § 1985(c) provides for liability for conspiracy to deprive a person of his federal rights. An essential element of a § 1985(c) claim, however, is that the conspiracy be motivated by some racial or other class-based, invidiously discriminatory *animus*. It is not sufficient to allege *animus* against an individual. *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir.), *cert. denied*, 454 U.S. 1110 (1981). Plaintiff failed to show any such *animus* as to his own case.

Furthermore, 42 U.S.C. § 1985(2) only applies to intimidation of witnesses in a federal proceeding, and as the EEO hearing here was held before the County Commissioner's Court, the statute is inapplicable. *Redcross v. County of Rensselear*, 511 F.Supp. 364, 373-74 (N.D. N.Y. 1981). The Court thus finds that Plaintiff's § 1985 claims fail.

4. 42 U.S.C. § 2000e-3(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because . . . he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter (Title VII).

The parties agree that HCFD is an employer within the meaning of Title VII, and Plaintiff was an employee of HCFD. The parties agree Plaintiff has met all prerequisites to suit under Title VII.

Marilon Speed's EEO hearing was held pursuant to Harris County's Equal Opportunity Plan, and thus was "an investigation, proceeding, or hearing" within the meaning of the statute. *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F.Supp. 66 (S.D.N.Y. 1975), *aff'd*, 559 F.2d 1203 (2d Cir. 1977), *cert. denied*, 434 U.S. 920 (1977).

The Court has found that HCFD retaliated against Plaintiff for his testimony at the Speed EEO hearing in a variety of ways, including terminating his employment. Plaintiff thus established a case on retaliation. Although Defendants offered a variety of other grounds for termination, the Court found that none of these were in fact the cause of his termination, but were pretextual only, and that Plaintiff would not have been terminated but for his testimony at the Speed EEO hearing. *Jack v. Texaco Research Center,* 743 F.2d 1129, 1131 (5th Cir. 1984). The HCFD is thus liable to Plaintiff for lost wages and other benefits. To the extent HCFD is liable, Harris County and the Harris County Commissioner's Court are also liable. *Tex. Rev. Civ. Stat. Ann.,* art. 8280-120 (Vernon's 1954). The individual members of the Commissioner's Court, however, are not liable. The Court, however, has found that Plaintiff would have retired in January, 1984, and thus reinstatement is inappropriate.

5. 42 U.S.C. § 2000e-5(K) provides that the Court may in its discretion allow the prevailing party in a Title VII suit its attorneys' fees. Plaintiff has prevailed on his claims, and, indeed, the Court finds the behavior of the Defendants to have been knowing and willful. The Court thus finds that Plaintiff should recover reasonable attorneys' fees. Plaintiff shall submit affidavits and a brief within 30 days of the date of this Order, setting forth his claim for attorneys' fees. Defendants shall then file counteraffidavits and, or, an opposing brief within 30 days.

6. The Rehabilitation Act of 1973, 29 U.S.C. § 794, bars employers and programs which receive federal funds from discriminating against the handicapped. The Court

has found that Plaintiff was never discriminated against because of his lung condition. Thus, without finding that Plaintiff's lung condition constitutes a "disability" under the Act, or evaluating the other elements of Plaintiff's claim under 29 U.S.C. § 794, the Court finds Plaintiff is not entitled to relief on this claim.

7. Likewise, the Court further finds that Plaintiff's other claims based on allegations of discrimination against him as a handicapped individual are also without merit. Thus, Plaintiff's claims under 31 U.S.C. § 6716 and *Tex. Human Res. Code* § 121.003(F) (Vernon's 1980) also fail.

8. To establish a *prima facie* case under the Texas Tort Claims Act, *Tex. Rev. Civ. Stat. Ann.*, art. 6252-19 (Vernon's 1970), *recodified at, Tex. Civ. Prac. & Remedies Code* § 101.001 *et. seq.* (Vernon's 1986), Plaintiff must prove that he was injured within the scope of his employment by the negligent use of a motor vehicle or some other tangible object. The Court has found Plaintiff's only injuries were intentionally inflicted and that Plaintiff suffered no injuries due to Defendants' negligence. Thus, Plaintiff's claims under the Texas Tort Claims Act fail.

9. Plaintiff also sets forth claims based on Articles 5196 and 5205 of the Texas Labor Discrimination Act, *Tex. Rev. Civ. Stat. Ann.*, art. 5196, 5205 (Vernon's 1971). These statutes, however, appear to deal with blacklisting and immunity from prosecution for testifying in labor matters brought under that Act. Plaintiff cites no cases showing whether a private cause of action exists under these statutes, and, if so, the elements of such a cause of action and the remedies available. It

does not appear to the Court that these statutes are applicable to Plaintiff's case. The Court thus shall consider these claims MOOT unless Plaintiff files a brief showing his entitlement to recovery on these claims within 30 days of the date of this Order. Defendants shall file an opposing brief within 30 days thereafter, if appropriate.

10. The Court defers determining the amount of damages due to Plaintiff at this time because the Court wishes to review the testimony of Plaintiff's economist and receive further briefing from the parties on this issue. The Court thus

ORDERS Plaintiff to file the transcript of the testimony of Plaintiff's economist and a brief on damages in accordance with finding of fact 23. Defendants shall respond to Plaintiff's brief within 30 days of receipt.

11. To the extent any of Plaintiff's claims have been omitted from this Order, such relief is denied, unless Plaintiff files a brief within 30 days showing entitlement to such relief. Defendants may respond within 30 days of Plaintiff's brief.

12. In the event any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. In the event any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

DONE in Houston, Texas, this 16th day of December, 1986.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-2729

CARL JOHNSTON

v.

HARRIS COUNTY FLOOD CONTROL DISTRICT, ET AL.

(Filed June 30 1987)

FINAL JUDGMENT

Pursuant to the Court's Memorandum and Orders of December 16, 1986 and this date, and the stipulation of the parties, the Court

ORDERS final judgment is entered in favor of PLAINTIFF against Defendants Green, Jordan, Phipps, and Harris County Flood Control District, jointly and severally, for $142,071.00 in actual damages, $4,000.00 in punitive damages, $134,021.15 in attorneys' fees, and $10,861.58 in costs, with post-judgment interest on all of the above at 7.00% per annum. It is further

ORDERED that any recording of or execution on this judgment is INDEFINITELY STAYED against Defendants Green, Jordan, and Phipps.

This is a Final Judgment.

DONE in Houston, Texas, this 30th day of June, 1987.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-2729

CARL JOHNSTON

v.

HARRIS COUNTY FLOOD CONTROL
DISTRICT, ET AL.

(Filed June 30, 1987)

AGREEMENT AND STIPULATION

Inasmuch as the HARRIS COUNTY FLOOD CONTROL DISTRICT has decided that it is in the best interest of the FLOOD CONTROL DISTRICT to voluntarily pay any award rendered against the individual Defendants, the HARRIS COUNTY FLOOD CONTROL DISTRICT hereby agrees, and it is hereby stipulated, that the HARRIS COUNTY FLOOD CONTROL DISTRICT will pay any award, including punitive damages, ultimately rendered against the individual Defendants, on behalf of the Defendants.

In view of this Agreement, the parties stipulate and agree that it is unnecessary for the Court to make a finding concerning the liability of the HARRIS COUNTY FLOOD CONTROL DISTRICT under 42 U.S.C. § 1983 and that the Court need not and will not enter judgment against the FLOOD CONTROL DISTRICT under 42 U.S.C. § 1983.

It is hereby stipulated by Plaintiff and Defendants that this Agreement and Stipulation in no way constitutes a waiver by any Defendant of the right to appeal any aspect of this cause, including but not limited to, an appeal by any individual Defendant, except that Defendants will not appeal on the basis of the failure of the Court to determine the liability of the HARRIS COUNTY FLOOD CONTROL DISTRICT under 42 U.S.C. § 1983 for the acts of the individual Defendants.

In entering into this stipulation, the sole purpose of the parties is to avoid the unnecessary expenditure of time by the parties and the Court to litigate a finding which will have no practical effect given the voluntary decision of the HARRIS COUNTY FLOOD CONTROL DISTRICT to pay any judgment rendered against the individual Defendants.

In view of the voluntary agreement by the HARRIS COUNTY FLOOD CONTROL DISTRICT to pay any award against the individual Defendants, Plaintiff and Defendants hereby stipulate and agree that the rules governing stays of proceedings to enforce a judgment which are applicable to the HARRIS COUNTY FLOOD CONTROL DISTRICT shall apply to any judgment against the individual Defendants. The parties agree there will be no judgment against HARRIS COUNTY and the HARRIS COUNTY COMMISSIONERS COURT under 42 U.S.C. § 1983 since HARRIS COUNTY FLOOD CONTROL DISTRICT has agreed to pay any award under 42 U.S.C. § 1983.

To this end, the parties hereby stipulate and agree that if, during appellate review of the Judgment by this Court, any party is prejudiced in pursuing any appellate point

by this agreement of the parties that this Court need not make a finding of liability of the HARRIS COUNTY FLOOD CONTROL DISTRICT for the acts of the individual Defendants under 42 U.S.C. § 1983, the parties will file a joint motion for the proceedings to be held in abatement and request the case be remanded to the District Court to make a finding based on the record and argument of counsel, and the appellate proceedings resumed after the finding has been made by the District Court.

Signed this 19th day of May, 1987.

/s/ DAVID MELASKY
David Melasky
Assistant County Attorney for
Harris County, Texas
1001 Preston, Suit 634
Houston, TX 77002
(713) 221-5101
Attorney In Charge for Defendants

/s/ ERIC H. NELSON
Eric H. Nelson
Nelson, Locke & Fowler
3303 Main, Suite 300
Houston, Texas 77002-9392
(713) 526-1998
Attorney In Charge for Plaintiff

APPROVED BY:

/s/ JAMES DeANDA
James DeAnda
United States District Judge

Dated: 6-30-87

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-2729

CARL JOHNSTON

v.

HARRIS COUNTY FLOOD CONTROL DISTRICT, ET AL.

(Filed June 30, 1987)

MEMORANDUM AND ORDER

By Memorandum and Order dated December 16, 1986, the Court issued findings of fact and conclusions of law establishing the liability of the individual Defendants for actual and punitive damages on Plaintiff's claims under 42 U.S.C. § 1983, the liability of Defendants Harris County Flood Control District, Harris County, and the Harris County Commissioner's Court on Plaintiff's claims under Title VII, and denying liability on Plaintiff's remaining claims. The Court deferred determining the amount of actual damages under § 1983 and Title VII, the liability of the Government Defendants under § 1983, and attorneys' fees for further proceedings. The Court has reviewed the record and conducted additional proceedings, and now enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Pursuant to Finding of Fact 23 in the Court's December 16, 1986 Order, the Court finds Plaintiff's actual damages are $142,071.00.

2. Pursuant to Conclusions of Law 2 and 5 in the Court's December 16, 1986 Order, the Court enters the following findings on attorneys' fees.

a(Mr. Eric H. Nelson served as counsel for Plaintiff. A reasonable hourly rate at current rates for Mr. Nelson's work is $175.00 per hour. Mr. Nelson has reasonably expended 218.75 hours in prosecuting this suit.

b) Ms. Constance Acosta served as counsel for Plaintiff. A reasonable hourly rate at current rates for Ms. Acosta's work is $125.00 per hour. Ms. Acosta reasonably expended 86 hours in prosecuting Plaintiff's claims.

c) Mr. J. Patrick Wiseman served as counsel for Plaintiff. A reasonable hourly rate for Mr. Wiseman at current rates is $175.00 per hour. Mr. Wiseman reasonably expended 198 hours in prosecuting Plaintiff's claims.

d) Ms. Beatrice Mladenka-Fowler served as counsel for Plaintiff. A reasonable hourly rate for Ms. Mladenka-Fowler at current rates is $125.00 per hour. Ms. Mladenka-Fowler reasonably expended 392.50 hours prosecuting Plaintiff's claims.

e) Mr. Richard I. Colton is listed as counsel for Plaintiff. Mr. Colton, however, did not itemize his time on this case in his affidavit. Furthermore,

Mr. Colton neither submitted a supplemental affidavit nor appeared at the hearing on attorneys' fees. The Court, furthermore, does not recall Mr. Colton participating in this case at trial. The Court has no idea what Mr. Colton did in this case and thus finds he has not shown he is entitled to any attorneys' fees.

f) The Court finds Plaintiff's counsel used law clerks to assist in prosecuting this case. A reasonable hourly rate for law clerks at current rates is $35.00 per hour whether doing legal research or paralegal work. Mr. Nelson's law clerks reasonably expended 36.5 hours on this case for legal research and paralegal type work.

g) Defendants do not dispute Plaintiff's claim that $10,861.58 is a reasonable amount to compensate Plaintiff's attorneys for expenses incurred in this case and the Court finds such expenses were incurred, necessary and reasonable.

h) The Court finds there was no undue duplication of effort among Plaintiff's attorneys.

i) The Court further finds all hours claimed as attorney hours are for legal work. Plaintiff's attorneys did not seek attorneys' fees for clerical type work. Though some of the work done by Plaintiff's attorneys arguably could have been done by paralegals, the fact that this work was done by the attorneys will not diminish the fee award as their efforts enhanced their trial preparation. Moreover, Plaintiff's attorneys left the bulk of trial preparation to their most inexperienced associates to minimize attorneys' fees invested in the suit.

j) Finally, the Court finds that very competent work was done by Plaintiff's attorneys in this case, far above the average legal work the Court finds in most civil rights cases.

3. Pursuant to Conclusion of Law 2 in the Court's December 16, 1986 Order, the Court reserved ruling on Defendants HCFD's, Harris County's, and Harris County Commissioner's Court's liability under 42 U.S.C. § 1983. On May 19, 1987, the parties tendered an agreement and stipulation that HCFD will pay any award, including punitive damages, rendered against the individual Defendants and thus no further findings of liability need be made against any other Defendant on Plaintiff's 42 U.S.C. § 1983 claims. In accordance with this agreement, the Court abstains from making any further findings on liability on Plaintiff's § 1983 claims.

CONCLUSIONS OF LAW

1. Pursuant to Finding of Fact 23 and Conclusion of Law 2 of the Court's December 16, 1986 Order and the Court's fact finding today, the Court finds the individual Defendants Green, Jordan, and Phipps are jointly and severally liable to Plaintiff for actual damages in the amount of $142,071.00. The Court's punitive damage awards are set forth in Conclusion of Law 2 of the Court's December 16, 1986 Order.

2. Pursuant to the stipulation of the parties, the Court finds Defendant HCFD is liable for all damages assessed against Defendants Green, Jordan, and Phipps.

3. Pursuant to Conclusion of Law 4 of the Court's December 16, 1986 Order, the Court finds Defendant HCFD is liable to Plaintiff under Title VII for $142,-

071.00 in actual damages. Pursuant to the stipulation of the parties the Court shall not enter a judgment against the other Government Defendants.

4. Plaintiff, however, shall receive only one recovery for his actual damages and accordingly the Court shall enter judgment pursuant to stipulation against Defendants Green, Jordan, Phipps and HCFD, jointly and severally, for $142,071.00 in actual damages on all of Plaintiff's claims under 42 U.S.C. § 1983, Title VII, and for $4,000.00 in punitive damages. In accordance with the stipulation, however, the judgment against the individual Defendants shall be stayed.

5. The Court has previously determined that Plaintiff is entitled to recover attorneys' fees in this matter. Fact findings have been made to this effect, however, the Court must now analyze the fact findings in light of the considerations to be measured in setting fees established by Fifth Circuit case law. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

In *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982) (Copper Liquor III), *modified*, 701 F.2d 542 (5th Cir. 1983), *overruled in part on other grounds, Gibbons v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986) (en banc), *U.S. app. pending*, no. 86-322: *International Woodworkers v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986), *U.S. app. pending*, no. 86-328, the Fifth Circuit summarized the proper procedure for determining attorneys' fees awards as applicable here:

> *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), listed twelve factors that must be considered by a district court in this

circuit in awarding a statutorily authorized attorneys' fee:

> (1) The time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee [for similar work in the community], (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undersirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.
>
> The district judge is required to " 'explain the findings and reasons upon which the award is based, including an indication of how each of the twelve factors in *Johnson* affected his decision.' " . . .
>
> Of the twelve *Johnson* factors, recent Fifth Circuit decisions suggested that four of the factors deserve "special heed": "(1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained, and (9) the experience, reputation, and ability of counsel." . . . These factors should be considered in the following framework:
>
> (1) Ascertain the nature and extent of the services supplied by the attorney;
>
> (2) Value the services according to the customary fee and quality of the legal work; and
>
> (3) Adjust the compensation on the basis of the other *Johnson* factors that may be of significance in the particular case. (citations omitted).

Copper Liquor III, 684 F.2d at 1092.

The Court has already made fact findings satisfying the first two steps of the analysis in Finding of Fact 2, *infra*. The total amount of attorneys' fees due prior to adjustment in step three is $134,021.25 plus $10,861.58 in costs.[1]

The Court shall review the fees in light of the *Johnson* factors. First, as stated in Finding of Fact 2, *infra*, the Court finds the time spent by counsel to have been reasonable. Plaintiff's attorneys have carefully documented their time expenditures (with the exception of Mr. Colton for whom no award is made), and included in the Court's findings that the time spent was reasonable are the Court's conclusions that counsel's efforts were not duplicative and were productive. Plaintiff's counsel did very good work in this case and were obviously well prepared at trial.

Second, the novelty and difficulty of the questions involved in the case were not unique, but there were difficult legal issues in the case. For example, whether Defendants HCFD or Harris County would be liable for the actions of the individual Defendants under 42 U.S.C. § 1983, and whether certain federal handicap and state labor laws might apply presented complex questions of law. Thus, while the retaliation aspects of the case were legally straightforward, other issues complicated the suit.

Third, the skill required to perform the legal services properly must be considered. Here, Plaintiff had to deal not only with some difficult legal issues, but also a case with much reliance on circumstantial evidence. In addition, Plaintiff himself was not without his flaws, nor were

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1. Current prevailing rates are to be used in calculating attorneys' fee awards. *Copper Liquor III*, 684 F.2d at 1096 n. 26.

Defendants' obvious villains. *See* Court's Order of December 16, 1986, Finding of Fact 12, Conclusions of Law 2 at 10. Moreover, suing a government entity is always made difficult due to issues of immunity. Adequate preparation and competent presentation can turn a pumpkin into a carriage; an ill-advised question, a witness overlooked, a fact ignored, can make the prince a frog. In these matters, even hindsight is not 20-20 but it is the opinion of this court that this case required skillful counsel to achieve a successful result.

Fourth, preclusion of other employment by Plaintiff's counsel must be weighed. Plaintiff's counsel concede this case did not create any conflicts for them, but, as amply documented, the time demanded by the case would have precluded some other employment.

Fifth, the Court has made findings as to the customary fees for counsel at current rates. *See* Finding of Fact 2, *infra.*

Sixth, the Court must also consider whether the fee is fixed or contingent. Here, Plaintiff's attorneys agreed to rely solely on an attorneys' fee award for compensation. Thus Plaintiff's counsel's fee is contingent and they assumed a risk in prosecuting this case.

Seventh, consideration of time limitations imposed by the client is concededly not germane to Plaintiff's fee request.

Eighth, the amount involved and the results obtained must be weighed. Here, Plaintiff's counsel expended an enormous amount of time on the case, however, the results were excellent. Plaintiff not only is recovering substantial actual damages but punitive damages as well.

Defendants HCFD and Harris County have accepted liability for payment of all damages and attorneys' fees ultimately awarded. Moreover, while Plaintiff did not recover on his age and handicap claims, it was Defendants who injected fact issues on age and infirmity into the case. *See, e.g.,* Plaintiff's trial exhibit number 8. The Court found that any reliance by Defendants on Plaintiff's age or infirmity in their treatment of Plaintiff was pretextual only. *See* Court's December 16, 1986, Order, Finding of Fact 19. Nonetheless, Plaintiff's attorneys cannot be faulted for addressing issues raised by Defendants. Furthermore, as issues of age and infirmity were part of Defendants' articulated reason for terminating Plaintiff, these issues are integrally bound up with Plaintiff's retaliation claims.

Ninth, the experience, reputation and ability of Plaintiff's attorneys must be considered. Plaintiff's attorneys' affidavits all set forth their backgrounds and in setting a reasonable hourly rate for each the Court took those considerations into account. The rates set are the prevailing rates for attorneys of similar backgrounds and skills in federal court litigation in Houston, Texas.

Tenth, the undesirability of the case is also a *Johnson* factor. Suing a governmental entity is never easy due to various immunity issues. Moreover, here the local county government is the defendant and any award will be paid by the taxpayers. Finally, civil rights law has become a less desirable area of practice as the flood of frivolous civil rights suits in recent years has increased judicial and public skepticism of such cases.

Eleventh, the nature and length of professional relationship with the client is not particularly relevant as the relationship is restricted to this one case.

Twelfth, and finally, attorneys' fees awards in similar cases must be considered. Plaintiff's expert on attorneys' fees, a well known civil rights attorney, testified Plaintiff's attorneys' fees were reasonable and in accordance with fees awarded in similar cases. Defendant's expert objected to this conclusion, however, Plaintiff's expert was an attorney of far greater experience in these matters and the Court gives his opinion the greater weight as to this factor.

The Court thus finds that an attorneys' fee based on current rates and actual hours worked is reasonable. The Court, however, does not believe this case was so extraordinary as to justify a multiplier nor so simple as to warrant a reduction. *See Abrams v. Baylor College of Medicine,* 805 F.2d 528, 536-37 (5th Cir. 1986). The Court thus shall award attorneys' fees of $134,021.15 and costs of $10,861.58 to Plaintiff pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k). Moreover, Plaintiff is entitled to post-judgment interest on his attorneys' fees and costs. *Copper Liquor III* (as modified), 701 F.2d at 544-45.

Finally, Defendants have made a motion for additional findings of fact and conclusions of law on the Court's denial of their motion to disqualify counsel. This motion includes no proposed additional findings or conclusions, and, moreover, was made months after the case was tried. The Court is of the opinion the motion is neither in proper form nor timely and thus ORDERS it is DENIED.

Defendants also moved to take the deposition of Judge Jon Lindsay in order to show that he presided over Ms. Speed's EEO hearing. The transcript of the hearing, however, is in the record. *See* Plaintiff's trial exhibit

number 1. The decision of the Commissioner's Court is also in the record. *See* Plaintiff's trial exhibit number 2. Moreover, Judge Lindsay is the chief officer of Harris County and the Harris County Commissioner's Court, Defendants in this suit, and any relevant facts within his knowledge should have been developed prior to trial. The Court thus ORDERS the motion is DENIED.

A final judgment shall be entered in accordance with this opinion.

DONE in Houston, Texas, this 30th day of June, 1987.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-2729

CARL JOHNSTON

v.

HARRIS COUNTY FLOOD CONTROL DISTRICT, ET AL.

(Filed August 4, 1987)

ORDER

Pending before the Court is Defendants' motion for new trial on the issue of liability under 42 U.S.C. § 1983. The gravamen of this motion is that the testimony of Plaintiff before the Commissioners Court was not protected speech under the First Amendment because it pertained to matters of individual employee concerns, not matters of public concern. Defendants' motion, however, misses the point of the Court's ruling. Plaintiff's speech was protected under the first Amendment not merely for its content but also due to the context in which it was given: testimony as a witness before a government fact-finding body hearing an official matter. Were Plaintiff's speech made in a private context Defendants' argument may have some force, but as the Court already found that Plaintiff was retaliated against for his testimony given under oath before the Commis-

sioners Court Defendants' argument is without merit. The Court thus

ORDERS the motion is DENIED.

DONE in Houston, Texas, this 4th day of August, 1987.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX I

[1]

HARRIS COUNTY COMMISSIONERS COURT
EQUAL EMPLOYMENT OPPORTUNITY
HEARING NO. 2

JULY 24, 1980

10:30 AM

Reported by:
Paula Lucchesi

[2]

APPEARANCES

Commissioners:

Mayor Jon Lindsay, County Judge
County Commissioner Tom Bass, Precinct 1
County Commissioner Jim Fonteno, Precint 2
County Commissioner E. A. "Squatty" Lyons, Precinct 4

For Harris County E.E.O. Officer:

Mr. ANTHONY D. SHEPPARD
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

[3]

JUDGE LINDSAY: This is Equal Employment Opportunity Hearing No. 2 under the County's Equal Opportunity Plan developed some years back and the complainant will now testify.

This is relatively informal, but tell the Court what you think, and it is just as if you were before Court and you are under oath and subject to the pains and penalties of perjury.

MS. SPEED: Basically I was dismissed for doing my job. The union did not like the fact that I was feeding information to my supervisor.

MR. SHEPPARD: Let me stop you. You have alleged in some of the written material you have filed that you think the union is against you for some reason. This body is not interested in a bunch of hearsay, only interested in something concrete such as any threat made to you or any actual happening that you think would lend credence to what you are saying about the union being against you quote unquote.

MS. SPEED: Recently, shortly before I transferred to the Holmes Road camp, they, being the union steward called a sit-down

[4]

strike because he decided that I was not doing my work.

MR. SHEPPARD: What's that person's name?

MS. SPEED: Rudolph Ramsine.

MR. SHEPPARD: Where does he work for the Flood Control District?

MS. SPEED: At the Holmes Road base. He is assistant or acting shop steward at the Holmes Road base.

MR. SHEPPARD: What did he do with the sit-down strike now?

MS. SPEED: I was engaged in marking up maps, indicating locations of the various ditches and what have you which is a sit-down job at a desk.

MR. SHEPPARD: Why is that an important task to mark ditches on maps?

MS. SPEED: As you gentlemen know, they are all numbered and what have you. In order to locate a broken down piece of equipment or ditch you are supposed to be working on, you have to have some reference since the ditches are not already on most maps, and you have to mark them in and indicate the ditch number, what

[5]

have you.

MR. SHEPPARD: This is for the crews to use for maintenance purposes?

MS. SPEED: For the crews and foremen to locate their crews or find where they are supposed to be working, and for the shop to find where the broken down equipment is.

MR. SHEPPARD: Is that a job a lot of these folks at the camp like to do?

MS. SPEED: No, sir. It's my understanding that most of the people really don't like to do the job at all and I rather enjoyed it so I did quite a few of them, like twelve or fourteen, probably.

MR. SHEPPARD: What happened when you were marking those maps for maintenance purposes?

MS. SPEED: Well, I had been sent out with a supply of blank maps and instructions that when I was not doing anything else I would fill in the maps, and the time when I was not running parts or filling out other paperwork, I was doing this and the people decided, "She's not doing anything."

MR. SHEPPARD: I hate to

[6]

interrupt you, but what was your actual job or position?

MS. SPEED: I was listed as parts runner but I was also sent out there to assist in the paperwork involved in keeping track of the attendants and the absence, keeping equipment numbers marked on each invoice so we knew what piece of equipment it was.

MR. SHEPPARD: Get to the sit-down strike incident. You were there marking the maps for maintenance purposes because that's not a job a lot of peole want to do out there. What happened?

MS. SPEED: These people decided I was not doing my work, that I was sitting there twiddling my thumbs, and after lunch one day they informed the foreman that they were not going to go back to work because I was not doing any work. There was some discussion about it and finally I think they got up and went back to doing what they were supposed to do after 30 or 40 minutes or something, and Mr. Johnston and Mr. Jordan came out and talked with these people, basically with the union steward, the following day and informed them I was doing what I had been

[7]

told to do and if they had any complaints it should go through them.

MR. SHEPPARD: Let me ask you this: You were kind of timekeeper out there?

MS. SPEED: Yes, sir.

MR. SHEPPARD: What does that entail very quickly?

MS. SPEED: Keeping up with who came in late, who's absent, whether they are absent or sick, personal business, that sort of thing, turning it in to the camp timekeeper and mark it on the sheet.

MR. SHEPPARD: It that a job that makes you a lot of friends?

MS. SPEED: Not really.

MR. SHEPPARD: Lot of them help you friendship-wise?

MS. SPEED: Well, folks don't like being reminded if you come in late two or three times a week.

MR. SHEPPARD: Did you have a few run-ins as timekeeper?

MS. SPEED: Infrequently, yes, sir.

MR. SHEPPARD: What do you mean

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by that?

MS. SPEED: Well, one gentleman who was consistently late and had a record of being consistently late came in and I was required to fill out a slip, turn it in

to the main office when people were late for whatever reason, and it was blank for the explanation. This gentleman came in and told Mr. Jasick, "what difference does it make, you know, who cares if I'm late?" There was a big argument right there by my desk and this is the gentleman that the union claims that I caused to have his raise postponed.

MR. SHEPPARD: I am talking to you about the claim. Previously you have said that the union got on you for causing a guy to lose his raise? Quickly tell the Court about that incident.

MS. SPEED: Uh-huh.

MR. SHEPPARD: Which apparently is based on the fact that you had him coming in late as timekeeper?

MS. SPEED: There was a record that I kept in a steno notebook and I had these slips that were turned in on each page, and this

[9]

man had three-quarters of a page since the first of the year and the decision was made to postpone his raise because of his poor attendance.

MR. SHEPPARD: Who said that you had cost him his raise?

MS. SPEED: There are about six or seven signatures on the original complaint that was submitted to Mr. Green, but presumably Rudolph Ramsine claimed that in behalf of this Robert Johnston.

MR. SHEPPARD: This is kind of as either the union steward or at least the head union person at this camp?

MS. SPEED: Right.

MR. SHEPPARD: This would be hearsay, but is it Johnston, Carl Johnston.

MS. SPEED: Yes, sir.

MR. SHEPPARD: Did he tell you at the time you were hired that he had had trouble from the union because they wanted a union person to have that job or anything like that?

MS. SPEED: Yes, sir, the union had complained that they wanted someone promoted from within and he had promoted I believe either three or four times and found all of them

[10]

unsatisfactory, and then he had transferred them to other positions.

MR. SHEPPARD: Is that when he went outside the agency to hire you?

MS. SPEED: That's when he went outside the agency to hire me, yes, sir.

MR. SHEPPARD: If this had been a public hearing, we would close it but since closed, have you heard a bunch of raunchy scuttlebutt about you having some kind of connection with Carl Johnston?

MS. SPEED: Yes, I have.

MR. SHEPPARD: Are they alleging you are having an affair with Carl Johnston?

MS. SPEED: I heard that rumor.

MR. SHEPPARD: Is that true?

MS. SPEED: No, sir.

MR. SHEPPARD: Is Mr. Johnston a married man and so forth?

MS. SPEED: Yes, sir.

MR. SHEPPARD: Can you think of any reason why people would want to say that about you and Johnston?

MS. SPEED: Other than the fact that it's difficult for a male and female of any

[11]

discrepancy to be strictly friends without people drawing untoward conclusions.

MR. SHEPPARD: Let me ask you some more questions. Have you ever had a date with Carl Johnston?

MS. SPEED: No, sir, other than we would go out to lunch as a group from the office.

MR. SHEPPARD: Other people would be there, and so on?

MS. SPEED: Yes, sir, right.

MR. SHEPPARD: That's a false allegation?

MS. SPEED: Right.

MR. SHEPPARD: By the way, tell the Court about this committee of some kind that has been given power to fire, apparently, or something like that. What is the makeup of that?

MS. SPEED: The way I understand it, this committee was originally constructed as a first level of appeal when the supervisor dismissed someone, that they were origin-

ally not impowered to dismiss people, but strictly as a review board, of their peers so to speak, mostly not supervisory personnel or at least not high

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level supervisory personnel, and one of them is a union steward. The other has been recently elevated to assistant supervisor and I failed to see—my supervisor was also on the committee and he argued in my favor with the committee and tried to get them to go by the rules that Mr. Jordan had put out, and they refused to do so.

MR. SHEPPARD: Let's get to these files. Of course, you asked the Flood Control District to furnish you with an entire copy of your personnel file, is that correct?

MS. SPEED: That's correct.

MR. SHEPPARD: I told you Mr. Green yesterday brought what is represented to be your entire file over to me in the County Attorney's office?

MS. SPEED: Yes, sir.

MR. SHEPPARD: This morning did I allow you to look at that before the hearing as you would have a right to do?

MS. SPEED: That's correct.

MR. SHEPPARD: Contained in that file, of course, is the document that's supposed to set up what punishment will be given for what infractions and so forth?

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MS. SPEED: Yes, sir.

MR. SHEPPARD: You might look at that, you know.

MS. SPEED: Well, we were all required to sign a copy of this list.

COMMISSIONER LYONS: This list you were required to sign, requires it?

MS. SPEED: They sent copies around and said to have everbody sign one to indicate they had read it.

COMMISSIONER LYONS: Who is "they"?

MS. SPEED: Mr. Jordan's office, I assume.

COMMISSIONER LYONS: Not Jim Green?

MS. SPEED: To my knowledge—no, Mr. Jordan's signature is on the document. Whether it was approved by Mr. Green or not, I do not know.

MR. SHEPPARD: Well, in examining that file, as a matter of fact did you note that something had been left out of the file when it was given to me?

MS. SPEED: I surely did.

[14]

MR. SHEPPARD: What was left out of the file?

MS. SPEED: At the same time that the first reprimand is in the file, there was also a letter of appreciation issued to me that was not submitted along with my file.

MR. SHEPPARD: Has somebody apparently taken that out of the file, which in effect would have been taking that out of the evidence in this case at this point?

MS. SPEED: Yes, sir.

MR. SHEPPARD: Why don't you put that into evidence?

MS. SPEED: This is what was not in the file (indicating).

COMMISSIONER LYONS: Who does that come from?

MS. SPEED: My supervisor, Mr. Johnston and originally signed by Mr. Jordan, but Mr. Johnston was told to pass them to whoever he felt was worthy.

MR. SHEPPARD: This is dated October '79?

MS. SPEED: Yes. My view is that everything negative was in the file and there

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wasn't that much positive, but what was positive was not in it when it was put into evidence, so that just, you know—

In relation to this committee also I might say that the shop steward who was on the committee, I know for a fact, had quite a few bad letters in his file because I typed several of them.

MR. SHEPPARD: That's one other angle in this. The union steward, I believe you testified, that was on this firing committee is named D. R. Hart? Is that correct?

MS. SPEED: That is correct.

MR. SHEPPARD: And that partly forms the basis of this hearing, did you ask that you could be furnished without invading anybody's privacy, that you be furnished with a copy of that person's personnel file?

MS. SPEED: Yes, sir.

MR. SHEPPARD: Okay. And I tell you, now that

yesterday Green brought me what is represented to be D. R. Hart's personnel file. This is a person who was on the committee that voted to fire you and you wanted to examine that for the purposes of this hearing.

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I am giving you that file as furnished to me by Mr. Green. What do you see in that file?

MS. SPEED: The same disciplinary form I was required to sign and a change of status W-2 forms. There are no letters, though.

MR. SHEPPARD: Why did you want to examine that for the purposes of this hearing, that is, Mr. Hart's personnel file?

MS. SPEED: This gentleman I know for a fact has a multitude of bad letters in his file complaining of poor work, poor attitude, because I typed several of them.

MR. SHEPPARD: That's how you have personal knowledge of them, this not hearsay?

MS. SPEED: No, sir.

MR. SHEPPARD: Just generalize about the letters you personally typed and had put into that file.

MS. SPEED: Basically poor workmanship, things that had to be redone the second and third times or possibly a different mechanic sent because this man could not keep with it after

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two or three days.

MR. SHEPPARD: This would be just your job as a

typist, correct? You are not the one making the evaluation?

MS. SPEED: No, sir. This is strictly a letter I typed and of course when you type it, you comprehend what you are reading.

MR. SHEPPARD: What point did you wish to make by that file?

MS. SPEED: If this gentleman's file is that bad and he is still working—

MR. SHEPPARD: Well, and being on the committee, too?

MS. SPEED: That's the point I was fixing to bring up, if his file is that bad and he is still working and then is allowed to sit on a committee to condem someone who has had very little in their file actually, I would question the validity of the committee.

MR. SHEPPARD: Okay. Now you have seen all of the—in effect all of the evidence against you in your file. Of course, the Court has just looked at it, and there is all kinds of affidavits by many of the employees out there saying negative things about you in

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many respects. They claim you used racial epithets all the time such as the word nigger. Have you ever called a minority person whether working for Harris County or not, a nigger or any other kind of racial epithet?

MS. SPEED: No, sir.

COMMISSIONER LYONS: Let me ask this question

regarding the union: About how many Flood Control employees are a member of the union?

MS. SPEED: I have no figures on that.

COMMISSIONER LYONS: Do you have any idea at all, if it's most of them or half of them, or few of them?

MS. SPEED: Less than half.

COMMISSIONER LYONS: That's what I wanted to know.

MR. SHEPPARD: This rules and regulations, primarily drawn up by the union, I gather that, and you cannot say for sure?

MS. SPEED: I have no idea who actually drew them up. I do know they were drawn up after one individual got into a fight with another mechanic and was fired and assked to leave

[19]

the premises and he came back with a pistol in his hand and they felt that some outline should be drawn up as to what you should be fired for.

MR. SHEPPARD: Jim Green felt—

MS. SPEED: I really don't know—it was sort of hearsay.

MR. SHEPPARD: I personally asked Green where in the heck—I don't think I used the word heck—where that ridiculous quasi-official form came from, apparently signed like a contract, in everybody's file. He did not know. He said Ramirez had done it. I happen to know Ramirez would not have done that.

COMMISSIONER LYONS: We have our own personnel files, I mean, with Ramirez, Adrian Ramirez.

MR. SHEPPARD: It's possible he could have done it.

COMMISSIONER LYONS: I mean, our own forms and regulations, et cetera, coming out of the Personnel Department.

MR. SHEPPARD: Ramirez told me he did not do it. Jim Green evidently did not do it either.

COMMISSIONER LYONS: But Green

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accepted it?

MR. SHEPPARD: I don't even know that. His name is not on it. I think there are superintendents' names on it, and it's obviously ill-advised to shackle yourself like that in an administrative position.

COMMISSIONER BASS: I am concerned with somebody messing up the official files, taking things and adding things, this type of thing.

COMMISSIONER FONTENO: Who has access to these files, everybody?

MS. SPEED: At one time there were duplicate files on all the shop employees and Mr. Jordan maintained files on everybody in Flood Control.

COMMISSIONER BASS: Where do these come from here (indicating)? Do they come from Mr. Jordan?

MS. SPEED: Well, after Mr. Jordan allowed Mr. Ramirez to see the files, I understand Mr. Jordan transferred them all to his office.

MR. SHEPPARD: Mr. Johnston has no files and the reason the files are in this

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record is because I asked Bordelon to ask Green to furnish these files to me which was done on a timely basis for this hearing.

COMMISSIONER BASS: What I don't like is the fact the files have been tampered with.

MR. SHEPPARD: I didn't like that they put the dirt in her file and I think you said you had also been given credit in the safety program?

MS. SPEED: As you pointed out, the 1st of May I was promoted and given a raise and on the 31st of May I was fired, one man thought I was doing a good job and the other didn't.

MR. SHEPPARD: Are you here to tell the Court you are perfect in every way? Do you realize you do have some deficiencies?

MS. SPEED: I am certain I do.

MR. SHEPPARD: Do you think you may be a little terse sometimes?

MS. SPEED: At times I tend to be a little straightforward, maybe a little more than I should be.

COMMISSIONER FONTENO: Let me

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ask you a couple of questions. I take it by your testimony you are not a member of the union?

MS. SPEED: No, sir.

COMMISSIONER FONTENO: In this tardiness, could you give me any idea or estimate of what percentage of those people come in late?

MS. SPEED: Basically it's the same people over and over again.

COMMISSIONER FONTENO: Would that be one percent, fifteen percent, or one out of fifteen or one out of ten? Can you give me some estimate?

MS. SPEED: Probably one out of two, between ten to fifteen. The Holmes Road shop only carries I think eight or ten people.

COMMISSIONER FONTENO: And it's the same people consistently?

MS. SPEED: It's the same people consistently, yes.

COMMISSIONER FONTENO: What does the supervisor head of that department do? What do they do when people are coming in late?

MS. SPEED: Mr. Jasick, who was assistant supervisor and shop foreman at that shop would talk to people, but he is a very quiet

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individual. He doesn't have the temperment that you—

MR. SHEPPARD: Let me ask you this: In talking to you prior to this hearing, I think you said you had some personal knowledge that time matters were not being conducted as they probably should have been prior to your taking over that assignment, is that correct?

MS. SPEED: That's correct. We would find out indivi-

duals were on vacations and had been all week or they were absent and we did not know about it.

COMMISSIONER FONTENO: Do you have a time clock at that location?

MS. SPEED: No, sir.

COMMISSIONER FONTENO: Did anyone ever complain to you what you didn't have one there?

MS. SPEED: No, sir, that's been the system since I went to work for the Flood Control District.

MR. SHEPPARD: Do you have objective evidence that sometime prior to your getting involved in time-keeping that was done on an extremely loose basis?

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MS. SPEED: Yes, sir, by the fact we would ask about a particular mechanic and they said, "He's been out sick for a week." And we would say, "Why haven't we heard about it to put it on his card?"

COMMISSIONER FONTENO: When you got that job, it was not calculated to make friends for you if you were going to do that on a firm basis, correct?

MS. SPEED: No, sir.

JUDGE LINDSAY: Do the employees always report to the field office or sometimes report to the job site?

MS. SPEED: Mechanics always report to the shop.

MR. SHEPPARD: This would be at the Holmes Road Shop?

MS. SPEED: And on the North Main.

COMMISSIONER FONTENO: If they were working

at a job alone at these ditches, would they report directly to the job?

MS. SPEED: No, sir, I am connected to the shop rather than the field workers.

COMMISSIONER FONTENO: You looked

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on some maps, marked some numbers on them and the people, did they report directly to that job site or did they report to a camp?

MS. SPEED: All mechanics report to the camps. Well, I have no knowledge of the other people.

COMMISSIONER FONTENO: In the camp you worked at, Holmes Road camp, everybody out there was mechanics?

MS. SPEED: The people that I kept time for were mechanics. I kept the time for the shop and turned it into the timekeeper.

COMMISSIONER FONTENO: There was fifteen mechanics out there?

MS. SPEED: Probably ten at that shop.

COMMISSIONER FONTENO: That's all that you had dealings with?

MS. SPEED: Yes, sir.

COMMISSIONER FONTENO: You don't know anything about field employees?

MS. SPEED: No, sir.

COMMISSIONER FONTENO: Does the Flood Con-

trol District use a time clock for any employee of the Flood Control District?

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MS. SPEED: No, sir.

COMMISSIONER FONTENO: This is done by a person that keeps time?

MS. SPEED: There are paper tickets turned into the timekeeper. The foreman turns them in for his crew.

MR. SHEPPARD: It is hand kept and not with a time clock?

MS. SPEED: Right.

MR. SHEPPARD: You were the timekeeper for a certain group of employees at Holmes Road and I think is it your testimony you received a lot of static when you did that to the best of your ability?

MS. SPEED: Yes, sir.

MR. SHEPPARD: There was all kinds of sworn affidavits in your file against you for a hundred different reasons, and we don't want to take too much longer with this hearing, but reflect on that for maybe three or four minutes if you would and either categorically deny what's in these affidavits or explain a few of them or hit the high points.

MS. SPEED: One allegation is that I accused everyone out there of being

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thieves. That is not the statement I made. The statement I made is, "I don't think our people are thieves, but there

is certainly someone around here who is because we are going through a lot of jumper cables and a lot of hand tools."

This I knew because I was picking them up and when you are going through wrenches and screwdrivers every ten days, a hundred dollars' worth, somebody is taking them. They have got to be.

I'm trying to remember what some of the other statements are in there. There's a statement at one point that says that I said Mr. Jasick could not do his job well and what have you. What I actually said was that Mr. Jasick was too nice to his people and that they ran all over him.

MR. SHEPPARD: Who did you say that to?

MS. SPEED: The statement in there is from Mr. Gray who was—

MR. SHEPPARD: Was this a public statement you made to ten or fifteen people?

MS. SPEED: No, it was a conversation between myself and one other person. I

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said that Mr. Jasick, I like him but these people took advantage of him and that if I were him I would not put up with the kind of attitude they had towards him.

MR. SHEPPARD: What kind of attitude is that, just in your opinion now?

MS. SPEED: To use the phrase, "The tail was wagging the dog." They were telling him what they wanted done and he was the sort who would rather crawl under the

truck and do it himself than argue with them about making them do it.

MR. SHEPPARD: Did he in fact actually go out and repair vehicles himself from time to time?

MS. SPEED: Yes, sir.

MR. SHEPPARD: Why would he do that to your knowledge?

MS. SPEED: In order to keep from conflict with these stronger-willed mechanics. I might add that Mr. Jasick has subsequently been removed from foremanship of that shop because Mr. Jordan assessed that he was not doing a good job.

MR. SHEPPARD: Is anything in

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the affidavits against you in the file that formed part of the evidence in this hearing true or half true? They said you could not get along with people and so on and so forth. Do you admit that to some extent you cannot get along with people?

MS. SPEED: To some extent, I am sure there are some people everybody does not get along with, and—

MR. SHEPPARD: I notice a bunch of witnesses, some are minority persons. Did they indicate that they would come over here and speak for you?

MS. SPEED: Yes, sir.

MR. SHEPPARD: What did you bring them over here for?

MS. SPEED: Most of these people I have worked with

longer than I worked at Holmes Road. One of them is from Holmes Road. The other fellows are from North Main. I was there over a year and a half.

COMMISSIONER FONTENO: You worked at North Main before you were transferred?

MS. SPEED: Yes, sir, transferred to Holmes Road because it's a mile from

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home.

MR. SHEPPARD: Are a couple of things in the affidavits under oath promulgated against you that you know? We won't go into the details, but they are outright falsehoods?

MS. SPEED: Yes, sir.

COMMISSIONER LYONS: All these witnesses are Flood Control personnel?

MS. SPEED: Yes, sir.

COMMISSIONER LYONS: Some are black, some are white, and I have no idea what they would say, but I assume she would not have called them as witnesses if they were going to say anything against her.

Have you talked to them at all?

MS. SPEED: No, not since all this started. The one man out there who has a statement in here derogatory, I called him because he specifically told Mr. Johnston on the Monday previous to the Tuesday that these statements were taken that he was well satisfied with my work, there were no problems and everything was going along fine.

The following day when Mr. Jordan came out, he gave him a full-page statement

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as to how displeased he was with my job.

MR. SHEPPARD: One other important aspect of the case you have told me through hearsay and the only reason I want to call Mr. Carl Johnston is the fact Mr. Johnston has been told indirectly that if he comes over here and testifies in any way to help you that he will be punished in some way?

MS. SPEED: It's hearsay—

MR. SHEPPARD: I want to hear from Carl Johnston.

MS. SPEED: As a matter of fact, he expressed that again while we were waiting for you to call me.

MR. SHEPPARD: Do you all want to hear anything else from Ms. Speed?

COMMISSIONER LYONS: Not me.

MR. SHEPPARD: If it's okay, can we bring in Carl Johnston?

CARL JOHNSTON

called as a witness on behalf of the Complainant, being first duly sworn by me, testified as follows:

MR. SHEPPARD: Okay. Mr. Johnston, how long have you been with the Flood

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Control District?

MR. JOHNSTON: Soon will be thirty-one years.

MR. SHEPPARD: What position do you hold out there?

MR. JOHNSTON: Supervisor of maintenance on equipment and shops.

MR. SHEPPARD: Okay. Of course you were not here when Ms. Speed testified. She has stated of course under oath and so forth that you were the one that brought her over to be employed by the Flood Control District. Is that correct?

MR. JOHNSTON: Yes, sir. I hired her. I did.

MR. SHEPPARD: She said you had told her, and this is hearsay out of her mouth, that the other people had apparently been promoted by the union members before she was hired, is that correct?

MR. JOHNSTON: I don't believe I understand that.

MR. SHEPPARD: She said that the position had been previously filled by other people that had apparently not been able to do

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the job to the liking of the management out there, is that correct?

MR. JOHNSTON: Yes, sir, the one at Holmes Road, but not the one—now, when I hired her over there, she was hired to make the mail run downtown and write receiving reports and everything in my office.

MR. SHEPPARD: When she was initially hired, she was hired from outside?

MR. JOHNSTON: Yes, sir.

MR. SHEPPARD: Okay. I could have easily misunderstood because I am not clear myself on the facts, but there was another opening out there that would have been a higher position that would have opened, is that correct, while she was the mail person?

JUDGE LINDSAY: The way I understood it, it was the job she took at Holmes Road that had been previously filled unsatisfactorily, I guess that was the question.

MR. SHEPPARD: Was there—and we are not trying to the union or anything else, and it is absolutely possible that there is a clique out there made up of union people that try to have things their way?

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MR. JOHNSTON: In her situation I would say yes, but normally the union has been pretty fair with me. I don't belong to it or anything. Can I tell you why?

MR. SHEPPARD: This is informal and you can say anything you want.

MR. JOHNSTON: What really brought this on is I have a man out there, this union steward Donald Martin, shop union steward. I had instructed her when she started running parts to make a route out of it and not everytime a mechanic said, "I need this or need that" to jump in the truck to get it. I said to find out if they need it right away, check with me or James Beaver, the shop foreman. I said, "Check with one of us if the mechanic tells you to go get something to be sure that it's okay."

Mr. Hart went out and would take the spark plugs off of the truck, the rotary cap off of it, the distributor

cap at the time she was writing receiving reports, he walked in and piled them on her desk and said, "Get me one of these, get me one of these and one of these." She said, "I will when the boss tells me to." And that made him mad and he's resented her

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ever since then. I moved her to Holmes Road. I moved her over there and the men got to rebelling against Eddie and I tried to get to fire him and she still would not do it. And we talked to Mr. Green about it and they are going to move him and put him in charge of the supply room and put Vernon over there so the shop foreman and Vernon don't have any education, and he can barely write his name.

Well, when somebody broke down on the road or something, somebody had to look it up on the key map and draw a map to go out there and you put her in there to do that, and he would go in there with the parts book, but he don't know one number from another. He would go in with the parts book and say, "Get me one of these." She would look up the parts number for it and order it for him and he was—she was helping it. He said she was trying to run the place.

MR. SHEPPARD: She was over there to in part help the man, that was what I have heard Ms. Speed say, not take his place because he's a functional illiterate, she was just sent over there to do typing and paperwork?

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MR. JOHNSTON: Yes, sir, and run the parts. I told her personally to find out from the men what to put the parts on before we can charge them out properly because

he could not do it and she would put the equipment from the mechanics and she was asking the mechanics what they were and they got a petition up—I was on vacation and I had to come back on Monday on other business and I went by over there and I asked him specific was she helping him and things and he told me she was and about Wednesday that same week while I was gone they got this petition up and I did not fire or anything and the committee called her in and Monroe Jordan told me to get her over there.

MR. SHEPPARD: You said a petition. We have not heard anything about a petition. What do you mean by that?

MR. JOHNSTON: Union people passed around a petition and carried it to Mr. Green and said that she was asking them questions and trying to run things, butting in and they could not perform their duties with her over there. And he told Monroe to check into it so when I came back off of vacation, Monroe

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called me in and told me to get her over there because I had another man that we had fired and he had asked for a hearing before the committee and while we was in there he told me to get it all at one time and have her over there.

I said, "Well, what happened? I haven't given her any time off."

He said, "We are going to have her before the committee." So she came in there and told me they had all this stuff and had put it in their file.

MR. SHEPPARD: This is apparently based on a petition. Now, we are not trying to single out the union but you yourself used the word these union people got up a petition against her. Was it largely the union people?

MR. JOHNSTON: Well, all the people in the shop signed it, all except I think there was two there that didn't make a complaint, but the guy that got it up at the time was a union steward.

MR. SHEPPARD: What's his name?

MR. JOHNSTON: Oscar Wheatfall.

MR. SHEPPARD: You said—is Hart a union steward?

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MR. JOHNSTON: Yes, sir, he is a union steward over there in there and he was on the committee that fired her.

MR. SHEPPARD: In looking through the really unequivocal documentary evidence, it looks like this committee—is it a five-person committee that fires or whatever?

MR. JOHNSTON: They are not supposed to fire. I specifically asked Mr. Green were they supposed to fire them and he said—he told me, "No, the supervisor took this action and if they did not feel like it was done fairly, they could ask for a hearing with the committee, and the committee decides whether to keep it or leave it where it stands." And they fired her and I tried to let them give her time off and I did not fire her. I was not for firing her because as far as I was concerned, she had done what I told her to do.

MR. SHEPPARD: You were her boss and she was doing what she was instructed to do?

MR. JOHNSTON: Yes, sir, by me and by Mr. Jordan. He went with me the day we transferred her over there. She has caused

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trouble over here and had to be transferred to Holmes Road. She lived over there and it would save her gasoline if she could work over there when the job came open.

MR. SHEPPARD: She was put over on Holmes Road because she was a troublemaker, and that's not true, is it, when these documents say that?

MR. JOHNSTON: No, that's not true.

MR. SHEPPARD: I am looking at the official separation document executed by the Flood Control District and it specifically says that the personnel committee—is that what they call this committee?

MR. JOHNSTON: Yes, sir.

MR. SHEPPARD: The personnel committee requests that employee's resignation or in the event that she would not resign, to be discharged, so the committee in effect did fire her, is that correct?

MR. JOHNSTON: Yes, sir, she did. The main thing I was going on is this letter Mr. Jordan put out with—I believe you have it right there. They told me in there the reason

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they was doing it was her attitude, she had a bad attitude. If you will read that, it says that the first time you are supposed to give them a warning.

Well, she had trouble at the radio shop one time when I called her in and told her myself. She was picking up parts for the public and taxpayers and the County. She was not considered that she was the customer, that she was picking them up, and if they gave her any trouble at all not to argue, to call me and let me talk to them. That's whenever this started and they called me over there and I talked to her about it. She never got a letter, they called her in and filed her on that.

MR. SHEPPARD: You are talking about the alleged incident now when she went in on behalf of the Flood Control District to pick up parts?

MR. JOHNSTON: Right.

MR. SHEPPARD: In a real sense, she is a customer, the Flood Control District is paying them money and the people at the private company griped that she was rude to one of the employees or something?

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MR. JOHNSTON: Yes, sir.

MR. SHEPARD: And there is two sides on that?

MR. JOHNSTON: There was two sides on this. I called Mr. Jordan in and I called the man at the radio shop and I called him and asked him, the radio was already repaired and everything needed to be put in the trunk of the car and locked. I sent her out to get some parts so she was going to stop by and get the radio. I called in for an appointment and he said anytime you come by the radio, put it in the trunk and lock it in. I said, "Well, if you cannot get to it, give me some time." I said give me a time. He said, "Any time will be all

right." He said, "Get that radio." She got out there and he failed to tell the shop foreman and he asked her what she wanted. She did not get in line, she told him that she stopped by to pick up the radio for the Flood Control District. He said, "Get in line." She got in the car and drove off and they called Mrs. Dawson at the Flood Control District and told her.

MR. SHEPPARD: That was the basis of the allegation that she had been rude to

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somebody at the parts place?

MR. JOHNSTON: When she went back, she came back and told me, "I guess I had gotten in trouble." She said this guy was a colored man and he was a foreman and "he had laughed at me." I asked them people out there to please get somebody else to wait on her because he had almost gotten her fired, almost got her fired, and—

MR. SHEPPARD: A person of the private company almost got a public employee fired?

MR. JOHNSTON: Yes, sir.

COMMISSIONER LYONS: Let me ask this: You said this committee heard it and then the committee discharged. Don't you really mean that the committee recommended to Jim Green that he follow through and let her go?

MR. JOHNSTON: They told her that day she was discharged.

COMMISSIONER LYONS: This committee does not have any authority to fire anybody, does it?

MR. JOHNSTON: I didn't think so, but they did on this.

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MR. SHEPPARD: I am looking at the entire record. I can see they actually don't—in other words, if the separation instrument was signed by somebody other than Jim Green, the auditor would say that nobody's fired until Green signs it. Apparently he took the recommendation as made by the committee.

JUDGE LINDSAY: But they did tell her she was fired?

MR. JOHNSTON: Yes, sir.

MR. SHEPPARD: That's what the official comment written about it.

MR. SHEPPARD: I want to also bring up and this is the reason I didn't have any trouble with the case. The official instrument giving the reason for her termination says she was fired because she was warned about her attitude and beligerence, and then you look at the ridiculous thing generated out there and the punishment for bad attitude is a maximum two-weeks suspension. They generate the rule and take her completely out of the rule and terminate her.

COMMISSIONER BASS: Well, now, we also heard allegations that you were asked or

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warned, whatever phrase you want to use, not to testify today in her behalf. Is there anything to that statement?

MR. JOHNSTON: Well, in a roundabout way, not specific from nobody, but I had three different people ask

me if it was true, and that they were going to make me be fired or discharge me if I tried to come down here and commend her in this thing. I said, "Well, I don't know myself, but if it does, it will just have to happen because I don't really do people that way." Nobody came out and told me that, no sir.

COMMISSIONER LYONS: When we take action, do we go back in Court to take any action, or do you do it in here?

MR. SHEPPARD: We can do it in here, this is something that can be held behind closed doors.

COMMISSIONER LYONS: An action of the Court can be taken in here?

MR. SHEPPARD: It's really your pleasure.

JUDGE LINDSAY: To make it official, it would have to be done out there.

COMMISSIONER LYONS: Haven't we

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always repaired from this?

MR. SHEPPARD: My personal view is we don't need to parade these other witnesses out there, that what we ought to do is, and I would make the recommendation then that one of you all make the motion out here to do whatever you are going to do and I will draw up an instrument for the Judge to sign.

Thank you, Mr. Johnston.

[Whereupon the Commissioners and Mr. Sheppard moved into the Courtroom, and whereupon the following proceedings were had:)

JUDGE LINDSAY: Based on the expressed desire of the Flood Control District, in executive session, it is the will of the Court that the Complainant Marilyn Speed be punished by losing two weeks' pay, she would receive weeks' back pay that she wrongfully lost, and that she be reinstated starting next Monday, and also the Court found fault with the certain legal document that's been distributed the Flood Control District that goes against the official Harris County and Flood Control District regulations because it attempts to create tenure

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and that should be done away with also if that's the Court's wishes, and the County Attorney will draw up the instrument as expressed in closed session.

COMMISSIONER LYONS: I move the recommendation of the County Attorney's office pertaining to this matter be approved.

COMMISSIONER BASS: And I second it.

JUDGE LINDSAY: All those in favor say aye.

THE COMMISSIONERS: "Aye."

JUDGE LINDSAY: All opposed say no.

MR. SHEPPARD: I will draw up an instrument for the Judge's signature.

(Whereupon the hearing adjourned at 11:50 a.m)

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THE STATE OF TEXAS :

COUNTY OF HARRIS :

I, Paula Lucchesi, a court reporter duly certified under the laws of the State of Texas, certify that I was in attendance upon the hearing before Commissioners Court of Harris County, Texas, of Equal Employment Opportunity Hearing No. 2, which hearing took place on July 24, 1980, and was recorded by me in machine shorthand; that I caused my shorthand notes to be reduced to typewriting and that the above and foregoing pages comprise a true and correct transcription of the proceedings there brought on.

GIVEN under my hand this ____ day of_____, 1980.

PAULA LUCCHESI
Notary Public in and for
Harris County, Texas

My Commission Expires:
October 23, 1980

No. 89-497

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FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1989

HARRIS COUNTY FLOOD CONTROL DISTRICT, ET AL.,

Petitioners,

v.

CARL JOHNSTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Can an employer avoid Title VII liability for a retaliatory discharge by asserting that the employee is racially discriminatory, even though two courts have found that basis pretextual?

2. Can an allegation of retaliation for testimony at an Equal Employment Opportunity hearing give rise to a First Amendment action under 42 U.S.C. § 1983 in addition to an action under Title VII?

3. Does a public employee enjoy the protection of the First Amendment for truthful, compelled testimony at an official governmental fact-finding hearing?

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42 U.S.C. § 2000e-3(a)..... 2, 5, 8

42 U.S.C. § 2000e-5(c).....13, 19

Tex. R. Civ. Evid., Rule 701..... 16

The Respondent, Carl Johnston, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 869 F.2d 1565 (1989).

STATEMENT OF THE CASE

Carl Johnston, the Respondent in this case, began working for Harris County Flood Control District (HCFD) as an hourly laborer in 1950. By 1977, Johnston had advanced to a supervisory position; he continued to work in that capacity until HCFD terminated his employment in 1981. Johnston's position at HCFD was secure throughout those thirty years.

In 1980, Marilyn Speed, another HCFD employee, filed an Equal Employment Opportunity ("E.E.O.") charge against HCFD. The Harris County Commissioners Court called an Equal Employment Opportunity hearing to review Ms. Speed's allegations, and summoned Johnston to testify. At the official hearing on July 24, 1980, Mr. Johnston testified under oath that Speed had been a satisfactory employee. The Commissioners Court subsequently ordered Speed reinstated, with full seniority and longevity.

Immediately after the hearing, HCFD lashed out at Johnston with a series of retaliatory employment actions. HCFD curtailed Johnston's responsibilities; took away his office; singled him out for denial of a cost-of-living raise; required him to perform menial tasks; pressured other employees to ostracize him; and, finally, attempted to

force him to accept a formal demotion. When Johnston refused the demotion, HCFD terminated his employment.

Johnston then filed this action against HCFD and its individual directors, alleging that their retaliation violated his rights under both Title VII and the First Amendment. HCFD, in defense, offered what it claimed were non-retaliatory justifications for firing Johnston.

The district court rejected those justifications as pretextual, finding that "[HCFD's] wrongful acts were at all times in retaliation for [Johnston's] testimony at the EEO hearing." Memorandum and Order of December 16, 1986, (reprinted as Appendix D of Petitioners' brief), Finding of Fact No. 19. The court thus found HCFD liable under both 42 U.S.C. §1983 (First Amendment) and 42 U.S.C. §2000e-3(a) (retaliation). The Fifth Circuit affirmed the district court's findings of liability under both provisions. *Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1571-1578 (5th Cir. 1989).

REASONS FOR DENYING CERTIORARI

I.

AN EMPLOYEE CANNOT AVOID TITLE VII LIABILITY FOR A RETALIATORY DISCHARGE BY ASSERTING THAT THE EMPLOYEE IS RACIALLY DISCRIMINATORY, PARTICULARLY WHERE THE TWO COURTS BELOW HAVE FOUND THAT BASIS PRETEXTUAL.

A.) Petitioners' Claim

The defendants' claim – that the opinions below will hinder employers from disciplining discriminatory or otherwise bad faith supervisors – is frivolous.

B.) No Impediment

Neither the District Court nor the Court of Appeals created even the slightest impediment to employers relieving supervisors for reasons other than illegal retaliation. Rather, both Courts clearly held, that whatever Mr. Johnston's racial problems may have been, these problems formed no part of the basis for his termination. *Johnston*, 869 F.2d at 1572.

> We express no opinion whether Johnston's racial biases would have provided permissible grounds for firing him or whether HCFD employees would have a colorable Title VII claim based on Johnston's racial biases. Neither of those cases is before us. In the case that is before us, an employer tolerated a supervisor whose racial attitudes and practices created difficulties in the work force. When it became desirable to terminate the supervisor, his racial attitudes suddenly became intolerable. HCFD had accepted Johnston's attitudes and the liability risk they created for many years. The trial court could easily conclude that, having done so, HCFD cannot now cloak itself in principles of nondiscrimination – principles which it once chose to ignore – in an effort to shield itself from Title VII liability. We affirm the district court's finding that HCFD violated §704(a) of Title VII.

Johnston, 869 F.2d at 1573.

C.) Intent as Evidence

Intent, such as the retaliatory intent attributed to HCFD here, is intrinsically a question of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). The holding of the District Court was found reasonable by the Court of

Appeals. *Johnston*, 869 F.2d at 1572. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 (1985).

D.) Two Court Rule

It has long been the rule that the Supreme Court does "not grant certiorari to review evidence." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Where as here, both Courts below have concurred in a fact finding, this Court inevitably denies review "absent some extraordinary reason for undertaking this task." *Goodman v. Lukens Steel Co.*, ___ U.S. ___, 107 S.Ct. 2617, 2623 (1987), citing *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

E.) No Extraordinary Review

The instant petition closely parallels that filed in *Goodman*. In *Goodman*, the petitioners asserted that the district court's opinion rested on an erroneous legal premise. This Court stated: "We need not discuss this rather abstract observation, for the [district] court went on to say that the evidence proves 'far more' " than alleged by the petitioners, *Goodman*, 107 S.Ct. at 2623, and

the Court of Appeals affirmed. *Goodman*, 107 S.Ct. at 2624. Likewise, here both the District Court and the Fifth Circuit found "far more" than that Mr. Johnston had a history of strained relations with minority employees. "Rather, the court concluded that Johnston was competent, albeit not perfect, a plausible view of the evidence that we decline to disturb as clear error."[1] *Johnston*, 869 F.2d at 1572.

Since the HCFD has pointed to no "extraordinary reason" for undertaking review, and the record reveals none, this Court should deny the petition. *Goodman*, 1075 S.Ct. at 2623.

II.

AN ALLEGATION OF RETALIATION FOR TESTIMONY AT AN EQUAL EMPLOYMENT OPPORTUNITY HEARING GIVES RISE TO A FIRST AMENDMENT ACTION UNDER 42 U.S.C. §1983 IN ADDITION TO AN ACTION UNDER TITLE VII.

A.) Petitioners' Claim

The Court below held that the plaintiff had a cause of action against HCFD under 42 U.S.C. §2000e-3(a) for retaliation as well as a claim under the First Amendment for violations of Respondent's free speech rights by these governmental defendants. The Petitioners argue that, because the same set of facts give rise to plaintiff's First

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[1] "HCFD did not fire Johnston until he engaged in a practice that embarrassed HCFD, itself; HCFD cannot now hide behind its belated and feeble efforts to eliminate discrimination in the workplace in an effort to escape Title VII liability." *Johnston*, 869 F.2d at 1573.

Amendment claim and his Title VII is his exclusive source of relief. This argument is contrary to well-established federal jurisprudence.

B). Dual Causes of Action

A plaintiff may bring a claim both under Title VII and 42 U.S.C. §1983, so long as the Section 1983 claim is based upon a separate constitutional right or statute from Title VII. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974).

In *Alexander*, the Court analyzed the legislative history of Title VII and found that it was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. *Alexander*, 415 U.S. at 48-49. Or, as held in *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975), the "legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."

> Since 1871, when it was passed by Congress, §1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights. Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended.

Smith v. Robinson, 468 U.S. 992, 1012 (1984) (citations omitted). Given the holding in *Alexander*, there can be no doubt as to Congress' intent in the passage of Title VII.[2]

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[2] Because Congressional intent to create dual liability is clear *Middlesex City Sewerage Authority v. National Sea*

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C.) Dependent Claims

Great American Federal Savings and Loan Association v. Novotny, 442 U.S. 366 (1979), is not to the contrary. *Novotny* does not speak to cases involving constitutional claims based upon rights that exist independent of Title VII.[3] Rather, *Novotny* involves a plaintiff's attempt to create a conspiracy cause of action against a private employer under 42 U.S.C. §1985(3) but arising out of Title VII. *Novotny*, 442 U.S. at 372. Section 1985(3) may not be invoked to redress violations of Title VII because Section 1985 creates no substantive rights itself but (as a purely remedial statute) provides a civil cause of action when some otherwise defined federal right is breached by a conspiracy. *Novotny*, 442 U.S. at 370-72. Because his claim was a claim against a private employer, Mr. Novotny could point to no other "statutory" or constitutional provision that was violated other than Title VII.

The *Novotny* court simply ruled that a plaintiff cannot avoid the procedural rigors of Title VII by claiming that he is not bringing a Title VII case but rather is maintaining a "conspiracy to violate Title VII" case. *Novotny*, 442 U.S. at 375-76. On the other hand the *Novotny* Court was very clear to announce that "this case . . . does not involve two 'independent' rights . . ." *Novotny*, 442 U.S. at 378.

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Clammers, 453 U.S. 1, 19-20 (1981) is inapposite. See *Maine v. Thiboutot*, 448 U.S. 1 (1980).

[3] See *Novotny*, 442 U.S. at 377, n.21.

D.) Independent Claims

The present case, by contrast, does involve two independent rights created by two independent sources: First, the right of free speech guaranteed by the First Amendment; and second, rights guaranteed by Section 704 of Title VII, 42 U.S.C. § 2000e-3. In the companion circumstance of Title VII and §1981 this Court has only recently reaffirmed that "where [Title VII and §1981] do in fact overlap we are not at liberty 'to infer any positive preference for one over the other.' "[4] *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363, 2375 (1989).

In sum, the Petitioner's argument fails because, unlike the plaintiff in *Novotny*, Mr. Johnston is asserting two independent rights: (1) his free speech right to speak out against acts of discrimination; and (2) his right to be free from retaliation under 42 U.S.C. 2000e-3(a). Because these rights flow from different constitutional and statutory sources, they are independent of each other and may be asserted together, even though the same facts give rise to both causes of action.

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[4] Not only does Title VII not preclude enforcement of independent federal claims, it "expressly preserves nonconflicting state claims in its §708." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101 (1983).

III.

A PUBLIC EMPLOYEE ENJOYS THE PROTECTION OF THE FIRST AMENDMENT FOR TRUTHFUL, COMPELLED TESTIMONY AT AN OFFICIAL GOVERNMENTAL FACT-FINDING HEARING.

A.) Legal Standard

A governmental employee does not surrender his/her right to freedom of speech under the First Amendment when accepting governmental employment. Such employment cannot be conditioned upon the forfeiture of First Amendment rights even where the employee has no property interest in the employment. They may not be compelled to relinquish First Amendment rights that "they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public [agencies] in which they work." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Perry v. Sinderman*, 408 U.S. 593 (1972).

In the workplace the question of First Amendment protection revolves around whether the employee's expression is compatible with the nature of his employment. To establish that it is incompatible, the employer must prove that the working relationship between the employer and the employee was so intimate and personal that public criticism would undermine the effectiveness of the working relationship. Only if the employer meets that burden may a court uphold a restriction upon, or deprivation of, an employee's First Amendment rights. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285 (1977).

The employer is entitled to show that it has a legitimate interest in maintaining discipline and efficiency in delivering public services. *Connick v. Myers*, 461 U.S. 138 (1983). *Connick* outlines the appropriate questions to balance these concerns.

(1) Was the expression at issue one of significant public concern?

(2) Did the employee's expression impede his ability to perform his duties?

(3) What were the time, place and manner considerations at stake?

(4) What was the employee's motive for expression and the context of the expression?

Connick v. Myers, 461 U.S. at 151-54. See also *Mount Healthy*, 429 U.S. at 287.

"The threshold question in applying this balancing test is whether [the employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern.' "[5] *Rankin*, 483 U.S. at 384. This threshold issue is the only substantive defense that Petitioners assert against Mr. Johnston's First Amendment claim.

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[5] This is not to say, however, that only public speech is protected by the First Amendment. As *Rankin*, citing *Connick*, makes clear, even private speech is afforded a considerable umbrella under the constitution. "Even where a public employee's speech does not touch upon a matter of public concern, that speech is not 'totally beyond the protection of the First Amendment,' but 'absent the most unusual circumstances a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency

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B.) Petitioners' First Contention

The speech in question here consists of statements made by Mr. Johnston before a formal E.E.O. hearing conducted by the Harris County Commissioners Court. The hearing itself was pursuant to county policy at the request of an HCFD employee named Marilyn Speed. Mr. Johnston was not a party to this hearing but rather was required by his employer to appear as a witness. Petitioners conceded that Mr. Johnston's testimony was wholly truthful[6] and nondisruptive of the workplace[7].

Petitioners simply assert that this information is not of public concern. "In the case at bar, the closed hearing conducted by the Commissioners Court, in its capacity as the governing body of the Flood Control District, did not pertain to a matter of public concern but was merely an intergovernmental concern of an individual employee –

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allegedly in reaction to the employee's behavior.' " *Rankin*, 483 U.S. at 384, n.7 (citation omitted). As plaintiff will demonstrate, *infra*, he was fired not for improper behavior but rather for his exercise of his right to freedom of speech.

[6] Where comments of public concern are substantially correct they generally cannot furnish grounds for dismissal, *Pickering*, 391 U.S. at 570, even where the speaker acts with improper motive. *Harte-Hanks Communications, Inc. v. Connaughton*, ___ U.S. ___, 109 S.Ct. 2678, 2684 (1989).

[7] Non-inflammatory statements made in response to a formal request cannot be considered disruptive. *Cf. Connick*, 461 U.S. at 154; *Givhan v. Western Lines Consolidated School District*, 439 U.S. 410, 415, n.4 (1979).

Marilyn Speed." Petitioners' Brief at p.18. This argument fails.[8]

1.) Context

First, Petitioners' argument that the Circuit Court's decision misinterprets *Rankin*'s use of the term "context" is fundamentally flawed. Mr. Johnston not only concedes but endorses Petitioners' claim that "[i]n using the term 'context' in *Rankin*, this court referred to the subject matter of the discussion in which the disputed speech occurs."[9] Petitioners' Brief at 17-18. However, *Rankin* also goes further and, quoting *Connick*, 461 U.S. at 147-48, expressly incorporates the "context" issue into the underlying determination of whether a matter is, in fact, one of public concern. " 'Whether an employee's speech addresses a matter of public concern must be determined by the content, form and *context* of a given statement as revealed by the whole record.' " *Rankin*, 483 U.S. at 384-85 (emphasis supplied). Thus, when the Court below held that "[w]here an employee testifies before an official government adjudicatory or fact-finding body he speaks in a

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[8] Whether the hearing is open to the public or closed except to the participants and witnesses is not dispositive of the issue of public concern. *Givhan*, 439 U.S. at 413-416.

[9] Indeed, as the *Rankin* Court indicated, the employee's speech "will not be considered in a vacuum; the manner, time and place of the employe's expression are relevant, as is the context in which the dispute arose" in balancing the state's interest in promotion efficiency against the employee's right to speak out on matters of public concern. *Rankin*, 483 U.S. at 388.

context that is inherently of public concern", *Johnston*, 869 F.2d at 1578, it did not err. Rather, it faithfully followed this Court's dictates as set out in its established First Amendment jurisprudence.

2.) Due Process

Second, while a governmental institution is not generally required to provide hearing mechanisms for (non tenured) employee grievances, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), where it does so it must conform to the requirements of First Amendment due process. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) ("It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments.") To punish the Respondent under the facts of this case is surely to deprive him of due process.

3.) Forum

Third, this is not an attempt to constitutionalize a governmental employee's grievance as condemned in *Connick*, 461 U.S. at 146. Indeed, the E.E.O. mechanism was established and put in place by the governmental agency to provide itself with a factual record and assure that it was not violating federal law,[10] Mr. Johnston had no personal stake in its outcome. This is in direct contrast to *Connick*, where the plaintiff's intent was merely "to

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[10] See 42 U.S.C. § 2000e-5(c).

gather ammunition for another round of controversy with her superiors." *Connick*, 461 U.S. at 148[11]

While an employee cannot "require a public office to be run as a roundtable for employee complaints over internal office affairs," *Connick*, 461 U.S. at 149, neither can the public office solicit, entice or compel an employee to provide an honest opinion on a matter of public concern (such as sex discrimination) and then terminate the employee for doing so. See *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). That is, having created a limited public forum, HCFD could not then punish Mr. Johnston for the appropriate, truthful and nondisruptive use of that forum no matter how parochial his statements. *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (A forum can be created by a state statute providing for open meetings.)

Even if the EEO hearing is considered a non public forum, HCFD could not reasonably punish Mr. Johnston. "Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise

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[11] This record is devoid of evidence from which to suggest that Mr. Johnson "threatened the authority of the employer to run the office." *Connick*, 461 U.S. at 153. In fact, Mr. Johnston could only be said to threaten such authority if he had refused to testify.

includible subject." *Cornelius v. NAACP Def. and Ed. Fund*, 473 U.S. 788, 806 (1985) (Citations omitted). Mr. Johnston was ordered by the County to appear and testify. It cannot thereafter terminate him for such testimony and meet the *Cornelius* reasonableness test. *Cornelius*, 473 U.S. at 809. A non-public forum cannot be a "First-Amendment-free zone". *Board of Airport Commissioner v. Jews for Jesus, Inc.*, 482 U.S. 569, 576, (1987).

It is a moral duty of citizenship to provide properly constituted governmental bodies with factually accurate information upon request. This duty is not less rigorous for public employees than it is for private citizens.[12] Having created such a forum, the county cannot place disinterested employees in the precarious position of requiring their attendance, administering the oath to them, demanding truthful testimony and then seeking to punish for that very testimony.[13] In a similar situation,

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[12] While this Court's "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." *Connick*, 461 U.S. at 17. But the reverse must be equally true. Where a governmental employee testifies truthfully at the request of his employer he cannot later be stripped of his citizen's right to free speech simply because he is so employed. *Cf. Moore v. City of Kilgore*, 877 F.2d 364, 371, n.3 (5th Cir. 1989).

[13] It is certainly ironic that Petitioners complain of Mr. Johnston's factually accurate testimony. The gist of their complaint seems to be that Mr. Johnston did not express his personal opinions as to sex discrimination at the EEO hearing. Not

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this Court has concluded that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interests cannot outweigh an individual's First Amendment right to avoid becoming the courier of such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). Neither may Mr. Johnston be required to perjure himself or suffer termination. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or in other matters of opinion or force citizens to confess by word or act their faith therein.")

4.) Witness Immunity

Fourth, witnesses have generally been held immune from sanction (other than by criminal charges of perjury) for their sworn testimony. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325 (1983). Of course, one can argue that *Briscoe* can be distinguished on the grounds that the rule of immunity there set out is one of defense only or that it can rise to a First Amendment due process violation only in a judicial context. Neither distinction is sustainable.

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only was the very nature and title of the EEO hearing sufficient to place any reasonable witness on notice as to the discrimination claims underlying this matter but Mr. Johnston, under the specific questions asked of him by the county hearing officer, as well as the rules of evidence, was precluded from providing his lay opinion on such issues. Tex. R. Civ. Evid., Rule 701. Nevertheless, the County Attorney now seeks to strip him of First Amendment rights, solely because Mr. Johnston did not willfully interject nonresponsive answers to those questions.

Witness immunity, either in the *Briscoe* context or the one found here, is fundamentally important to protect the integrity of any adjudicatory process, whether it is judicial or administrative.

> "[T]he claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. Even within the constraints of the witness' oath there may be various ways to give an account or to state an opinion. These alternatives may be more or less detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.

Briscoe, 460 U.S. at 322-33, (citations omitted).

This same rationale supports the ruling in question here. "We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state."[14] *Johnston*, 869 F.2d at 1578. No

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[14] Put another way, HCFD cannot attempt to control its employees' thoughts. *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (the state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.") Nor can it compel an employee to divulge those thoughts in a proper manner and then retaliate against him.

practical distinction exists between the reluctance of a witness to submit his personal fisc to the whims of a damage action of the one hand and the loss of his or her major source of income – that is, employment – on the other.[15]

The second noted distinction, that due process protection is only afforded in judicial settings, has long been laid to rest. *Cf. Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (governmental officers, whether acting in judicial or quasi-judicial capacity, can violate due process). Not only does the logic in *Briscoe* reject such a claim but this court has denied such a distinction in the free speech realm. *Perry v. Sindermann*, 408 U.S. 593 (1972).[16] Moreover, the

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[15] To the extent that an employee does not rely upon his/her employment as the sole source of income, the coercive power of a threat of termination is mitigated. The court below accounted for this variation in its opinion. *Johnston*, 869 F.2d at 1578 ("those able to risk job security would suffer state-sponsored retaliation for speaking the truth" but those "unable to risk unemployment would scuttle our efforts to arrive at the truth.")

[16] As stated in *Connick:*

> Our cases following Pickering also involved safeguarding speech on matters of public concern. The controversy in *Perry v. Sindermann* . . . arose from the failure to rehire a teacher in the state college system who had *testified before committees of the Texas legislature* and had become involved in public disagreement over whether the college should be elevated to 4-year status – a change opposed by the regents.

Connick, 461 U.S. at 145 (emphasis supplied).

hearing in question here cannot be regarded as a mere local governmental administrative proceedings. Under 42 U.S.C. Section 2000e-5(c), HCFD's hearing is an integral part of Title VII enforcement. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 101 (1983) ("State laws obviously play a significant role in the enforcement of Title VII.") Thus, if a local governmental entity may terminate an employee for truthfully testifying at a local EEO-type hearing, 'the meaning and enforceability of the congressional policy behind Title VII will be largely short-circuited.

C.) Petitioners' Second Contention

Petitioners decline to expressly define the concept of public concern. However, such a definition plainly exists.

> The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present. See Restatement (Second) of Torts Section §642D (1977). See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (action for invasion of privacy cannot be maintained when the subject matter of the publicity is matter of public concern); *Time, Inc. v. Hill*, 385 U.S. 374, 387-388 (1967).

Connick, 461 U.S. at 143, n 5.

As the Restatement points out: "To the extent that the constitutional definition of a matter that is of legitimate concern to the public is broader than the definition given in any State, the constitutional definition will of course control". Restatement (Second) of Torts §652d comment d (1977). And, as stated in *Cox:* "The special protected

nature of accurate reports of judicial proceedings has repeatedly been recognized." *Cox*, 420 U.S. at 492.

Likewise, Ms. Speed's claim of discrimination (whether ultimately supported by the hearing record or not) is clearly of public concern, and so is the Respondent's truthful, sworn testimony at the hearing (whether related to his opinion on the equal opportunities of women or to the more factually-specific evidence related to Ms. Speed's performance as an HCFD employee).[17] *Cf. Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (public concern is met where the primary reason for dismissal was criticism of school board's practices and policies which plaintiff considered to be racially discriminatory).

1.) Connick Not Applicable

Any fair reading of *Connick* will demonstrate that it was never intended to apply in circumstances such as the current one. Mr. Johnston is neither seeking to "constitutionalize" an employee grievance nor to mandate, under

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[17] As in the analogous circumstance found in *Cox*, Harris County established a formal procedure to place information before the Harris County Commissioner's Court for the administration of government. It must be presumed that the public interest was thereby served, *Cox*, 420 U.S. at 495, and therefore, that the information provided was of public concern. *Connick*, 461 U.S. at 143, n.5. "When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971). Even where it can establish such an interest it is not free, without more, to punish the speaker.

the guise of the First Amendment, a right to a grievance procedure. *Connick*, 461 U.S. at 154. The "public concern" language which runs throughout this court's public employee First Amendment jurisprudence "reflects . . . the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143 (footnote omitted). But, it also does not allow such offices to create a formal grievance procedure, compel a disinterested employee's sworn, truthful testimony and then punish that employee for speaking.[18]

2.) **Factual Statements**

Nor does the fact that Mr. Johnston's statements were purely factual – as distinguished from opinion testimony related to Mr. Johnston's belief in the appropriateness of sex discrimination in county jobs – deprive his remarks of First Amendment protections. " 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or

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[18] HCFD may be in the position to require employees to submit complaints about the operation of the District to narrowly drawn grievance procedures for action prior to taking such complaints public. *Pickering*, 391 U.S. at 572, n.4. If so, the Petitioners' position is that such employees can be terminated for statements at such a hearing – because they are not of public concern – or if taken public by the employee without benefit of a prior grievance for violation of the grievance procedure itself. Such duality cannot be tolerated. *Rankin*, 483 U.S. at 326, n.10 ("A public employer may not divorce a statement made by an employee from its context by requiring the employee to repeat the statement, and use that statement standing alone as the basis for a discharge.").

appropriate to enable the members of society to cope with the exigencies of their period.' " *Time, Inc. v. Hill*, 385 U.S. 344, 388 (1967), citing *Thornhill v. Alabama*, 310 U.S. 88, 102 (1941). Even had the plaintiff believed that sex discrimination was proper he nonetheless would be expected to provide factually correct information upon request. This is precisely the type of information that the Harris County Commissioners needed and were entitled to, and it is what they got. Both Courts below found this testimony to be of public concern.[19]

D.) Petitioners' Third Contention

Although Petitioners claim that the cause *sub judice* is in conflict with *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d at 75 (4th Cir. 1988) (Petitioners' Brief at p. 19, n.4), the two opinions can be harmonized. To the extent they are interpreted as conflicting, *Arvinger* is clearly wrong.

1.) False Statements

First, and foremost, the plaintiff in *Arvinger* was "fired for lying." *Arvinger*, 862 F.2d at 77. Thus, the Fourth Circuit was squarely faced with a question left open in *Pickering*. "Because we conclude that appellant's

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[19] Review by this Court "is limited in this context by [its] constitutional obligation to assure that the record supports this conclusion". *Rankin*, 483 U.S. at 325. Even then "credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses' ". *Connaughton*, 109 S. Ct. at 2696.

statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment." *Pickering*, 391 U.S. at 574, n.6. The opinion makes quite clear that substantial evidence existed to support this ground for termination. *Arvinger*, 862 F.2d at 76-77. Clearly, the panel's belief[20] that the employee's speech was untruthful and "made solely to further the interests of Mr. Arvinger" and another employee resulted in its determination that "[i]t was not made to further the public debate on employment discrimination . . . or any other topic." *Arvinger*, 862 F.2d at 79. In other words the employee's statements were "so without foundation as to call into question his fitness to perform his duties" under the *Pickering* analysis. *Pickering*, 391 U.S. at 573, n.5.

Such an employee, while having full right to communicate with an EEO investigator, is surely not entitled to lie about work-related matters and retain the confidence of his employers. This is a far cry from the factual array presented by the instant cause of action. Defendants here

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[20] The District Court ruled, as a matter of law, that the plaintiff's statement to a Baltimore Community Relations Commission investigator was about a matter of public concern, and that the defendants had failed to prove that the statement was disruptive or in any other way impaired the department's operation. *Arvinger*, 862 F.2d at 77. Apparently the Fourth Circuit reversed this finding based upon its duty to independently review the record and arrive at a conclusion on this matter. *See Rankin*, 483 U.S. at 325.

have asserted not a single fact or defense to impinge on plaintiff's veracity or to indicate that Mr. Johnston's job performance was impaired by his testimony. "Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here." *Pickering*, 391 U.S. at 570.

2.) Forum

Secondly, there are distinctly different conceptual concerns between a formal hearing and an informal communication with an investigator. A formal EEO hearing clearly meets the criterion for a limited public forum under *Perry*, 460 U.S. at 45-49. *But see Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280-84 (1984).

Even if such a hearing is considered a non-public forum for purposes other than the information sought by the hearing officer, Mr. Johnston so plainly limited his statements to germane issues that terminating him for such speech would be unreasonable under *Cornelius*, 473 U.S. at 809-10. Likewise, it is obvious that HCFD's interest in limiting Mr. Johnston's opportunities to factually contribute to the debate on sex discrimination at this EEO hearing is not significantly greater than its interest in limiting a similar contribution by any equally knowledgeable member of the general public.[21] *See Pickering*, 391

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[21] That is not to say that all members of the general public would be entitled to speak at such a hearing. However, when authorized or requested to speak, such a witness cannot thereafter be denied state sponsored rights or benefits for truthful statements. See generally *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

U.S. at 568. In the context of such a hearing due process precludes such limitations. *Barnette*, 391 U.S. at 642. Thus, as a matter of law, HCFD cannot meet *Cornelius'* reasonability test. *Cornelius*, 473 U.S. at 809. Even if it could "[t]he existence of a reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811. Clearly, to terminate an employee for requested, truthful testimony because that testimony was embarrassing is "viewpoint-based". In any case regulation under *Perry* is only concerned with the speech of those outside the institution, not those within. "[O]bviously [as to employees, regulation of speech] must be drawn more narrowly than regulations on the speech of outside representatives." *Texas State Teachers Association v. Garland I.S.D.*, 777 F.2d 1046, 1053 (5th Cir. 1989), rehearing denied, 784 F.2d 1113, aff'd 479 U.S. 801 (1986).

3.) Public Concern

Third, *Connick's* primary admonition is to separate public employees' free speech rights from attempts to "constitutionalize" employees' grievances. *Connick*, 461 U.S. at 154. This balance is struck between *Arvinger* and *Johnston*. It is clear from the totality of circumstances, or in the court's terms "the content, form, and context of a given record", *Rankin*, 483 U.S. at 384-85; *Connick*, 461 U.S. at 147, that while *Arvinger's* statements were wholly private and personal, Mr. Johnston's were not.

4.) Conflict

To the extent that these two cases must be said to create inconsistent legal principles, *Johnston* must prevail.

The Fourth Circuit's insistence "that 'content, subject-matter, is always the central aspect' " in determining the public concern value of speech, *Arvinger*, 862 F.2d at 79, puts it at odds with *Rankin*, 483 U.S. at 384-85, and *Connick*, 461 U.S. at 147-48. To the extent *Arvinger* undercuts the reasonableness standard articulated in *Cornelius*, 473 U.S. at 809, it is equally suspect. If *Arvinger* is said to hold that state-sponsored retaliation for compelled sworn testimony at an official governmental fact finding hearing is constitutional, it runs afoul of the compelling rationale found in cases such as *Reeves v. Claiborne County Board of Education*, 828 F.2d 1096, 1100 (5th Cir. 1987).

CONCLUSION

For all of the foregoing reasons the petition for a writ of certiorari to review the opinion of the Fifth Circuit Court of Appeals should be denied.

Respectfully submitted,

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